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Supreme Court, U.S.
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No.__

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM,1995

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

# PETITION FOR WRIT OF CERTIORARI

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February 5, 1996

43 pp

## QUESTIONS PRESENTED

I. Whether sanctions under Fed. R. App. P. 38 violates the holding of this Court in *McKnight v General Motors Corp.*, 114 S.Ct. 1826, 1826 (1994) and the Rules Enabling Act, 28 U.S.C. §2072(b) and the right to appeal under 28 U.S.C. §1291 where the Seventh Circuit sanctioned the plaintiff, personally, but imposed no fees on appellate counsel, for bringing a frivolous appeal where the case raised an issue of first impression in the Seventh Circuit..

II. Whether the Seventh Circuit's holding that there is no right to closing argument in all civil cases is contrary to prior Supreme Court precedent that the issue of the right to oral argument in a civil case must be decided on a case by case basis..

III. a). Does a District Court have subject matter jurisdiction in a Bankruptcy Appeal to impose a Rule 11 sanction? The Seventh Circuit's holding in this case is in conflict with *in re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987). If so, is a District Court's order entered in 1994 on a 1994 Rule 11 motion for sanctions governed by 1993 amended Rule 11? The Seventh Circuit held old Rule 11 applied and reversed the imposition of no fees under Rule 11 and remanded.

b). Whether an adverse credibility finding by a Bankruptcy judge constitutes a finding of perjury upon which a District Court sitting as an Appellate Court can impose sanctions under its inherent authority for bad faith trial conduct notwithstanding that the trial court that observed the witnesses entered no sanctions and in fact ruled that each party shall bear its own costs - implicitly making a factual finding that Tasker Generes was not litigating in bad faith.

c) Whether the 1993 confirmed plan of reorganization deprived the subsequent adversary proceeding of core matter jurisdiction rendering all subsequent proceedings without jurisdiction.

## PARTY LIST

Tasker O de Generes

**Edward L. Morrell**
**Patricia Morrell.**

The parties are individuals.

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

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Tasker Generes, Petitioners

v.

Patricia Morrell and Edward L. Morrell, Respondents

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Tasker Generes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

1. Unreported Order rehearing denied on March 21, 1996;
2. Unreported Rule 38 Order without opinion February 21, 1996;
3. Matter of Generes, 69 F.3d 821 (7th Cir. 1995);
4. Matter of Generes, 165 B.R. 1011 (N.D..ILL. 1994);
5. In Re: Tasker Generes and Dorothy Generes, Joint Debtors Tasker Generes, Plaintiff, v. Edward L. Morrell and Patricia Morrell, Defendants Adv. No. 92 A 01283, Judge Coar, United States Bankruptcy Court For the Northern District of Illinois Eastern Division EOD July 15, 1993. The opinion and order are unreported. (See Appendix "A" to this Petition).
6. Unreported order confiming plan of reorganization June 30, 1993, *In re Generes*, 91 B 17220, Chapter 11, Judge Coar.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals entered its judgment on February 21, 1996. On March 6, 1996 a petition for Rehearing and Suggestion for Rehearing In Banc was filed. It was denied on March 21, 1996. There have been no motions for extension of time to file a petition for a writ of certiorari.

## THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE.

1 United States Constitution, Amendment No. 5

2 28 U.S.C. §1291

3 Rules Enabling Act, 28 U.S.C. §2072(b), §2074(a).

4 Rule 38 of the Federal Rules of Appellate Procedure

5 Federal Rules of Civil Procedure, Rule 11 before and after the December 1, 1993 amendment, and Rules 52, 54(d), 81(a)(1).

6 Federal Rules of Bankruptcy Procedure for Adversary Proceedings 7001, 7002, 7008(b), 7052, 7054(b)

7 Federal Rules of Bankruptcy Procedure for Appeals to District Court, 8013, 8014, 8018(b)

8 Federal Rule of Bankruptcy Procedure, 9001(2), 9011.

## STATEMENT

### I. Background

This matter arose out of claims filed by Morrells against Tasker Generes in the Bankruptcy Estate of Generes, 91 B 17220, on account of a lease dispute. An Adversary Proceeding, 92 A 01283, resulted. However, it did not come on for trial until after the Debtors Plan of Reoganization had been confirmed on the morning of June 30, 1993. The Bankruptcy Court ruled against Generes and in favor of the Morrells and required each side to bear their own costs. The judgment order was a final judgment instead of a recommendation to an Article III judge. Generes filed a motion for a new trial which was denied. Then, Generes appealed.

Although Morrells had filed no motion for sanctions under Bankruptcy Rule 9011, and had prepared the draft of the Final Order requiring both sides to bear their own cost, the Morrells cross-appealed from the failure of the court to *sua sponte* award them costs and attorney's fees. The District Court without oral argument affirmed the Bankruptcy Court on the Appeal of Generes In addition, on defendant's Fed. Rule of Civil Procedure 11 motion, it sanctioned Generes for a frivolous unsubstantiated appeal, but awarded no attorneys fees or untaxed costs.

On the Morrell Cross-appeal, the District Court reversed the Bankruptcy Court for an abuse of discretion. It held since the Bankruptcy Court made an adverse credibility decision on the testimony of Generes, Bankruptcy Rule 9011 required that sanctions must be imposed against Generes. The District Court held that an adverse credibility finding was tantamount to a perjury finding against plaintiff. It remanded to the Bankruptcy Court to determine appropriate fees against Tasker Generes.

Generes filed a timely notice of appeal and Morrell cross-appealed the denial of attorney fees. The Seventh Circuit affirmed the District Court in all respects except the denial of attorney fees.

**II. The Generes Appeal to the Seventh Circuit**

The Seventh Circuit imposed sanctions for the filing of an appeal which it found to be substantially frivolous notwithstanding that it decided a question of first impression in the Seventh Circuit. On that question, it held that in all civil suits in the Seventh Circuit, as a matter of law, an attorney has no right to make a closing argument. It also held that notwithstanding that the trial court did not have the benefit of oral argument, the trial court's findings still were entitled to the deferential standard on review provided by Bankruptcy Rule 8013. The Seventh Circuit also rejected all other legal issues regarding the law of leases. It found therefore that the appeal was substantially frivolous and sanctions appropriate. Pursuant to Fed. R. App. P. 38, Lynn Downy Dowd, appellate

counsel for Generes, was required to prepare a response to the amount of the sanctions to be imposed. Ms. Dowd retained attorneys, Jerold S. Solvay and Laura A. Kaster, JENNER & BLOCK, to prepare the response before the Seventh Circuit.

On February 21, 1996 the Seventh Circuit imposed sanctions against Generes, personally, in the amount of $19,205.18 in attorneys' and cost under Fed. R. App. P. 38 for a frivolous appeal from the District Court. The Seventh Circuit affirmed sanctions for a frivolous appealt to the District Court for the same reasons. It also affirmed the District Court decision to reverse the Bankruptcy Court decision that each party was to bear its own costs not even discussing the express difference between Bankruptcy Adversary Rule 7054(b) and Fed. R. Civ. P. 54(d). Other Circuit's have held that the difference in language results in no presumption in favor of costs for a prevailing party in bankruptcy. *In re Consolidate Partners Invest. Co.* (Bankr. N.D. Ohio 1993), 156 B.R. 982 and seven other jurisdictions conflict with the district court's reliance on Fed. R. Civ. P. 54(d) as the basis for its costs award[1]. Further Bankruptcy Adversary Rule7008(b)[2] requires a request for fees to be pleaded which it was not.

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[1] 1st Circuit: *In re Roco Corp.* (Bankr. D.R.I. 1984), 37 B.R. 770, 775; *In re Hagan* (Bankr. D.R.I. 1984), 44 B.R. 59, 64; 2d Circuit: *In re Keller* (Bankr. N.D.N.Y. 1989), 125 BR. 716, 719; 3d Circuit: In re Gioioso (3d Cir. 1992), 979 F.2d 956; 8th Circuit: *In re National Marine Sales & Leasing, Inc.* (Bankr. W.D.Mo. 1987), 79 B.R. 442, 460; *In re Robertson* (Bankr. D. Minn. 1989), 105 B.R. 504, 507; 9th Circuit: *In re Aviva Gelato, Inc.* (9th Cir. BAP 1988), 94 B.R. 622, 624, aff'd (9th Cir 1991), 930 F.2d 26; *In re Coast Pacing Material Co.* (Bankr. S.D. Cal. 1989, 109 B.R. 410, 412; 10th Circuit: *In re Grynberg* (10th Cir. 1992), 966 F.2d 570, 573; *In re Investment Bankers, Inc.* (Bankr. D.Colo. 1991), 135 B.R. 659, 670-71; *In re Dunston* (D.Colo. 1992), 146 B.R. 269, 276.

[2] A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint or reply as may be

**III. The Morrells' Cross-appeal to the Seventh Circuit of the District Court's denial of additional attorney fee sanctions.**

However, the Seventh Circuit reversed the District Court's discretionary 1994 decision to not impose the additional sanction of attorney's fee under Federal Rules of Civil Procedure, Rule 11 as amended effective December 1, 1993. The Seventh Circuit held it would be unjust to apply the new rule because it found that filing of a frivolous appeal occurred shortly before the effective date of the amended rule. It specifically found irrelevant that during most of the appeal and when the District Court made its decision on Morrells' 1994 motion for additional sanctions, the new discretionary rule was applicable. *c.f., Elliott v Tilton*, 64 F.3d 213 (5th Cir.1995), (applying amended rule). The Seventh Circuit then remanded the matter to the District Court to impose appropriate Rule 11 costs and attorneys fees against Tasker Generes in favor of the Morrells.

**IV. The Morrells' Cross-appeal to the District Court of the Decision of the Bankruptcy Court.**

On the cross-appeal, the District Court reversed the Bankruptcy Court's decision that each party should bear its own costs. The District Court held that the Bankruptcy Court abused its discretion in not awarding attorney's fees to Morrell and requiring both sides to bear their own costs in the Bankruptcy Court.

In the Bankruptcy Court, the Morrells never made a motion for sanctions pursuant to Bankruptcy Rule 9011 or filed a claim for attorney's fees which should preclude any award on appeal or jurisdiction. The attorney for Morrell prepared the draft Final Order for the Court which provided that each side should bear its own costs. The Final Order made no mention of sanctions. The court clearly believed that not even the burden of costs should be awarded against Generes. This implicitly held that Generes was not

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appropriate.

litigating in bad faith in the Bankruptcy Court in the opinion of the Bankruptcy Judge who had observed the entire trial.

Nevertheless, the District Court held that Tasker Generes had committed perjury in testifying during the trial in Bankruptcy Court Adversary Proceeding and remanded the case to the Bankruptcy Court to determine the appropriate amount of fees and costs for litigating in bad faith in the Bankruptcy Court.

The District court did not allow any oral argument before holding that Generes was tantamount to a perjurer, *Matter of Generes*, 165 B.R. 1011, 1021 (N.D.ILL. 1994); *affirmed Matter of Generes*, 69 F.3d 821, 826 (7th Cir. 1995).

The District Court also upheld the decision of the Bankruptcy Court to not allow closing argument by Ronald Sandack of the firm Smith, Williams, and Lodge, attorneys for Generes in the Bankruptcy Court Adversary Case. However, the U.S. Supreme Court has acknowledged that a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument however brief. *Memphis Light. Gas & Water Div. v. Craft* (1978), 436 U.S. 1, 16 n.17 (quoting *Londoner v City of Denver* (1908) 210 U.S. 373. *See also, Molaire v Smith* (S.D. Fla. 1990), 743 F.Supp. 839, 845 (meaningful participation in an alien's exclusion hearing includes, *inter alia*, argument.)

**V. The Adversary Proceeding in Bankruptcy Court**

The Morrells owned a home at 2324 Clover Lane, Northfield, Illinois, which was partially destroyed by fire on December 15, 1990 when a candle ignited a wreath. Mrs. Morrell testified she was present. The Morrells had had a desire to remodel their home. For this reason Mrs. Morrell testified she had previously arranged with Mr. Sondina a contractor to remodel their home. Hence, Morrells called Mr. Sondina immediately after the fire to commenced the remodeling and repair together. Ms. Sondina testified that he charged Morrells around $150,000 for his work on their house.

The Morrells' insurance company authorized them to lease housing because their house was uninhabitable. Aided by their attorney, the Morrells entered into a written lease with Tasker Generes, which lease had been reviewed and approved by Morrells' attorney and insurance company, for the rental of the home located at 1829 Happ Road, Northbrook Illinois for a six-month period commencing on December 18, 1990 through June 17, 1991, with rent of $2200 payable on the 18th of each month. The lease contained a clause which provided that the time of each payment was of the essence. The lease also contained a holdover provision in the event that the tenants remained in possession beyond the agreement's term.

After delivering their first check for $6600 to Tasker Generes, comprised of the first month's rent and security deposit, the Morrells occupied the premises. All six payments from December 18, 1990 through May 19, 1991 were made on time and delivered to Generes' door by either Ms. Morrell or her children. This was the parties' customary way of delivery of communications. However, the Morrells did not vacate on June 17, 1991, in accordance with the written lease, nor did they pay the rent which would have been due then pursuant to their alleged oral lease.

The Morrells testified that they reached an oral agreement with Generes to extend the lease for two months when construction of their home was to be completed. According to the Morrells, the oral lease stemmed from a phone conversation made by Mr. Morrell to Generes' home at an uncertain date. Judge Morovich found that Morrells' made their alleged oral agreement in the first week of July.

Nonetheless, the Morrells did not pay July rent, due on June 18, 1991, until July 6, 1991, 18 days late. *See. Matter of Generes*, 69 F.3d 821, 825. (7th. Cir. 1995). The written Morrell check confirms that this payment did not occur until after July 1, when Generes testified he elected to leave an unnecessary written notice of hold over tenancy at their house. Generes' trial attorney could not put the legal issues in perpective with the facts adduced at

trial to assist the Court in closing argument because the Court allowed no closing argument to the prejudice of Generes. The failure to pay rent when due is a material breach of a lease in which timely payment is of the essence.

**VI. Basis of Jurisdiction below:**

This case originated in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division ("The Bankruptcy Court"), docket no. 91 B 17220. On August 14, 1991, Generes, represented by Smith, Williams. & Lodge, filed a petition for relief in the Bankruptcy Court. Thereafter the Morrells filed a timely claim for money allegedly due from Tasker Generes on account of a lease agreement between Tasker Generes and the Morrells. On September 6, 1991 Generes' attorneys on his behalf scheduled the Morrells' claim as disputed and described it as a holdover tenancy. They then commenced the Bankruptcy adversary complaint 92 A 01283 by Tasker Generes disputing the claim and asserting a counterclaim against the Morrells contesting their claim and seeking to recover unpaid rent from Morrells on the holdover tenancy.

In addition to the pleadings filed in this adversary, the brief depositions of Tasker Generes and Ed and Patti Morrell were taken at a mutually convenient time through the cooperation of counsels.

In the underlying Bankruptcy proceeding, Generes's plan of reoganization was confirmed on the morning of June 30, 1996. The Plan essentially was to borrow the money necessary to pay all creditors from Citibank. Immediately on confirmation, Generes closed on the loan from Citibank to implement the plan. With the plan's confirmation, all the assets of the bankrupty estate were transferred thereby back to Generes and the Morrell claim was extinguished by merger into the Plan of Reorganization becoming a contract obligation determinable under state law.

Thereafter, the adversary proceding, 92 A 012383 came on for trial. Because the plan had been confirmed the proceedings were no longer core proceedings.

Nevertheless, the Bankruptcy Court entered a final order sustaining the Morrells' claim, not allowing the Generes counterclaims and ordering each party to bear their own costs on July 15, 1993. On August 16, 1995 the Bankruptcy Court denied a motion for a new trial. A Bankruptcy Court is not an Article III Court and does not have jurisdiction to enter a final order in a non core proceeding on a fundamentally state law issue.

On August 19, 1993, the Clerk of the District court docketed the Notice of appeal to the United States District Court for the Northern District of Illinois, Eastern Division of the plaintiff, Tasker Generes, from a the order of the United States Bankruptcy court for the Northern District of Illinois, there docketed on July 15, 1993, and from the August 16, 1993 denial of plaintiff's motion for a new trial.

. On August 30, 1993, the Morrells cross-appealed the denial of fees and costs although they had never filed a claim in bankruptcy for attorneys fees as required by Bankruptcy Rule 7008(b) or a motion for sanctions or asked that all costs be imposed on Generes .

The United States District Court for the Northern District of Illinois assumed appellate jurisdiction over this matter pursuant to the United States Bankruptcy Code, 11 U.S.C., Rule 8001, 8002 and 28 U.S.C. §158(a).

On November 16, 1993, the District Court entered the Generes opening brief on the docket and on January 5, 1994 his reply brief was entered on the docket. On March 15, 1994, the District Court affirmed the Bankruptcy Court's decision to deny plaintiff closing argument. The District Court reversed the Bankruptcy Court's determination that each party should bear his own costs, and remanded to the Bankruptcy Court for a hearing on the amount of attorneys' fees and costs to be awarded defendants under Bankr.Rule 9011.

On March 24, 1994, Plaintiff, Tasker Generes, filed a timely Notice of Appeal to the Seventh Circuit Court of Appeals from the District Court's memorandum opinion. The Court of

Appeals has jurisdiction to review the District court's memorandum opinion and order and the underlying Bankruptcy final order pursuant to F.R.A.P. 4, 6(b); 28 U.S.C. §158(d); and 28 U.S.C. §1291, if the District Court had jurisdiction and the Bankruptcy Court had jurisdiction to enter a final order.

On April 14, 1994, the District Court taxed costs of $312.95

On April 18, 1994 Morrells filed a petition for Rule 11 attorneys fees and untaxed costs with the District Court for work on their prevailing appeal in the District Court from the Bankruptcy Court. On April 21, 1994 the District Court held a hearing and entered an order which refused to impose monetary sanctions. The Morrells did not file any motion that tolled the time within which to appeal. On May 20, 1994, the Morrells filed a Notice of Appeal to Seventh Circuit Court of Appeals of the denial of the further sanctions for which the Morrells had petitioned the District Court.

On November 3, 1995, the Seventh Circuit affirmed the District Court's decision in all respects except it reversed the District Court's decision that the sanctions already imposed were enough (See, new Rule 11) and remanded the matter to District Court to impose a mandatory sanction under old Federal Rules of Civil Procedure 11. The Seventh Circuit issued notice pursuant to its Rule 38 for further briefing of the issue of sanctions. Because whether there was a friviolous appeal of sanctions and credibility issues is the organic substance of this Court's basic decision, under *Osterneck v. Ernst & whinney, 489 U.S. 169, 174 (1989)*, the Seventh Circuit's issuance of a rule 38 notice is treated as equivalent to a motion on the courts inititive which involves reconsideration of matters properly encompassed in the decision on te merits. This rendered the Court's November 3, 1995 decision interlocutory.

On November 17, 1995, Morrells requested the Seventh Circuit Court of Appeals to tax costs of $226.21 for appeal which were then taxed by the clerk. Briefs were filed per Rule 38. And on February 21, 1996, Morrells were awarded attorneys' fees and

costs in the amount of $19,205.18 on account of the "frivolous" appeal. Generes petition for rehearing was denied on March 21, 1996.

Also, the District Court has not yet determined its sanctions. And, the Bankruptcy Court has awarded $17,100.00 on June 3, 1996 for costs and attorneys fees to Morrells against Tasker Generes. He filed a motion to vacate and amend on May 10, 1996.

This Petition for Writ of Certiorari to the United States Supreme Court was timely filed from the February 21, 1996 sanction decision of the Seventh Circuit Court of Appeals and within ninety days after the March 6, 1996 Petition for Rehearing and Suggestions for Rehearing in Banc was denied on March 21, 1996 by mail in accordance with United States Supreme Court Rules on June 19, 1996.

## REASONS FOR GRANTING THE PETITION

### I. Introduction

The Seventh Circuit's new decision to impose sanctions for a "substantially" frivolous appeal conflicts with the Third Circuit, which held sanctions may not be imposed unless an appeal is wholly without merit. *Sauers v Commissioner of Internal Revenue*, 771 F.2d 64, 70 n.9 (3d Cir. 1985) *cert denied* 476 U.S. 1162, 90 L. Ed. 2d 727, 106 S.Ct. 2286 (1986) and the same holding in the 1st, 4th, 9th, and 10th Circuits. This decision will substantially chill appellate advocacy in the Seventh Circuit. This is particularly true since even suggesting to the Seventh Circuit that it should alter its decision is a course not without danger. It has been determined by the Seventh Circuit, that additional sanctions may be imposed on a motion to reconsider the imposition of the first sanctions. *Brown v National Board of Medical Examiners*, 800 F.2d 168 (7th Cir. 1986).

The Seventh Circuit has decided that under the United States Constitution, a civil litigant, who has employed an attorney, has no right to have his attorney make a closing argument to the court in a bench trial involving several witnesses providing

conflicting accounts. This substantially devalues all attorney's services in America. Further this decision conflicts with prior Supreme Court precedent and leading State Supreme Court precedent on the right to counsel in a civil bench trial under the U.S. Constitution's Fifth Amendment. In consequence of this decision, what weight on review should be given to a judge's findings of fact which were made without hearing closing argument first to place the facts in the proper perspective in light of the applicable law. The "due regard" language of Bankruptcy Appeal Rule 8013 suggests that where a court's findings of fact are made without closing argument, the review courts must conduct a de nova review rather than review on a clearly erroneous standard.

There is conflict in the Circuits on when to implement new rules of procedures. A search on the term "just w/3 practical" reveals many conflicting decisions. The conflict seems to stem from two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach; the rule that a court must apply the law in effect at the time it renders its decision, especially where the new law is meant to remedy problems in the old law, and the axiom that statutory retroactivity is not favored. The decision in the case at bar fails to apply the proper standard to amended Rule 11 in light of *Landgraf v Usi Fil Products et al* 114 S.Ct. 1433 (1994).

This decision has subverted the American Rule on fee shifting. Judges often are required to decide between conflicting accounts given by witnesses in trials. It has never been the law that an adverse credibility finding was a finding of perjury. Further it has never been the law that a reviewing district court could reverse a trial judge's decision that there was no bad faith conduct warranting the imposition of costs or attorneys fees. After this Seventh Circuit decision, every witness in a trial where credibility is at issue will be placed in tremendous jeopardy. This is a fundamental change in our system of justice made without legislation. The rule has been one of absolute judicial immunity for the trial testimony of a witness to promote the use of courts to settle disputes.

## II. Seventh Circuit's Broadened Application of Circuit Rule 38 and New *per se* Frivolous Appeal Rule against Appeals of Any Factual Findings Chills Advocacy and Conflicts with Established Law.

Jerold S. Solovy, of the firm of JENNER & BLOCK, made the following eight points in response to the Seventh Circuit's November 3, 1995 Circuit Rule 38 order and conclusion that "the substance of the appeal is clearly frivolous and sanctions are appropriate." in *Matter of Generes*, 69 F.3d 821, 828 (7th. Cir. 1995).

1. Ms. Dowd had a basis for challenging the ruling of the bankruptcy court because the applicable evidentiary standard required the Morrells' to prove their case by clear and convincing evidence among other legal issues. The Seventh Circuit now holds any challenge to a credibility finding should be consider sanctionable *per se* (*See. Matter of Generes*, 69 F.3d 821, 828 (7th. Cir. 1995). However, litigants such as the appellant who lose at trial have a substantive right to appeal under 28 U.S.C. §1291. Indeed, as the Seventh Circuit has stated in other circumstances, "a 'full and fair opportunity to litigate' includes the right to appeal an adverse decision." *Gray v Lacke*, 885 F.2d 399, 406 (7th Cir. 1989. *cert denied* 494 U.S. 1029 (1990), *quoting Disher v Information Resources, Inc.*, 873 F.2d 136, 139 (7th Cir. 1989). Rule 38 of the Federal Rules of Appellate Procedure was adopted by the Supreme Court pursuant to the Rules Enabling Act, which provides: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Given that lower courts do occasionally err in their factual findings and can be reversed for being "clearly erroneous," the Circuit Court should not deem unsuccessful challenges to credibility determinations frivolous *per se* or sanctionable *per se*. Such a blanket application of Rule 38 is an abridgment of litigants' right to appeal, a result prohibited by the Rules Enabling Act. The appeal brief properly acknowledged the high standard applicable to an appeal on an issue of credibility.

(Appellant's Opening Br. 16-17, 23-24, 34).) Although the appeal was unsuccessful, it is submitted it was not sanctionable.

2. Indeed, the Seventh Circuit had recognized that Rule 38 should not chill litigants from making good faith challenges of credibility determinations (*N.L.R.B. v Lucy Ellen Candy Div.*, 517 F.2d 551, 555 (7th Cir. 1975) (*emphasis added*)):

> A frivolous appeal means something more to us than an unsuccessful appeal. We will grant that law may become so clear and well established that persistence in a course could be determinative of bad faith... We also bear in mind that notwithstanding the overburdened condition in which the courts now find themselves we would not desire to take action which could become the basis of chilling the assertion of rights reasonable held in good faith by virtue of imposing a penalty because of a failure to prevail in the litigation. *Further, while the courts generally uphold the credibility determinations ... of ... triers of fact, such a result is not mandatory and litigants should not be deterred from good faith and reasonable efforts to show the lack of any proper support for a credibility determination.*

The Seventh Circuit has continuously recognized this principle, refusing to sanction litigants who challenge credibility determinations even though the appeal claims are "long shots" and the chance of achieving a reversal of factual findings "slim" because such claim are "not utterly hopeless." *Meredith v Navistar Int'l Transp. Co.*, (35 F.2d 124, 128-29 (7th Cir. 1991). Rather, "[s]anctions are reserved for abusive conduct." *Hagge v Bauer*, 827 F.2d 101, 110 (7th Cir. 1987).

3. Moreover, credibility was not the sole issue presented. The appeal presented an issue of first impression for the Seventh Circuit: whether a Bankruptcy Court's denial of closing argument in a bench trial-adversary proceeding denies a litigant due process of law. In the course of her representation of the appellant, therefore, Ms. Dowd asked the Court to extend the Fifth Amendment's due process protection so as to require that closing arguments be

allowed in such circumstances. (See appellant's Opening Br. 31-34; Reply 7-11.) The appeal brief specifically and accurately stated that this is an issue of first impression with the Court. (Appellant's Opening Br. 31.) Also, Ms. Dowd submitted additional authority to the Court under Circuit Rule 28(j) showing that although an Illinois state appellate court may have decided that closing argument in a civil bench trial is a privilege rather than a right, other states have come to a different conclusion, and that in *Federal Communications Commission v WJR, The Goodwill Station*, 337 U.S. 265, 277 (1949), the United States Supreme court stated that 5th Amendment due process rights to a closing argument should be decided on a case-by-case basis.

4. Given that the appeal briefs straightforwardly presented the issue on closing argument as requiring an extension of the law and as an issue of first impression in the Seventh Circuit, the appeal presented should not have been held to be frivolous, even if the Seventh Circuit believed some of the arguments presented were unpersuasive. *See Rodgers v Wood*, 910 F.2d 444, 449 (7th Cir. 1990) (refusing to impose Rule 38 sanctions even though some arguments presented were clearly meritless because appellant also presented a good faith argument for an extension of the law); *Marquardt v North Am. Car Corp.*, 652 F.2d 714, 716 (7th Cir. 1981) refusing to impose Rule 38 sanctions against party who engaged in delay tactics because its appeal presented an issue of first impression concerning the standard for awarding fees to ERISA defendants), *see also McKnight v General Motors Corp.*, 114 S.Ct. 1826, 1826 (1994) (reversing Rule 38 sanction imposed by the Seventh Circuit because appellant presented arguments on an issue where circuit precedent was clear, but where Supreme Court had not yet spoken definitively on the issue and district courts were divided on the issue). Claims on appeal, even if they challenge factual findings, are not frivolous unless they are "entirely groundless" or contain "'blatant misrepresentations' of the facts or the law." *Meridith v Navistar Int'l Transp. Co.*, 935 F.2d 124, 128-29 (7th Cir. 1991) (citations omitted; *see also Donohoe v*

*Consolidated Operating and Prod.*, 139 F.R.D. 626, 634 (N.D.Ill. 1991)(defining frivolous claims in the Rule 11 context as those that cannot clearly pass the "straight face" test). Sanctions are inappropriate where not all of an appellant's arguments are without substance. *Northwestern Nat'l Ins. Co. v Baltes*, 15 F.3d 660, 664 (7th Cir. 1994); *Weiss v Coca-Cola Bottling.*, 990 F.2d 333, 335 n.2 (7th Cir. 1993). the presentation of appellant's argument for the right to a closing argument may not have persuaded the Seventh Circuit, but it was a non-frivolous substantive argument. Thus, the Seventh Circuit erred in sanctioning appellants for a frivolous appeal.

5. The other arguments presented to the Seventh Circuit were not pure credibility challenges as the Seventh Circuit's opinion suggests. (Op. at 6.) In particular, the appeal briefs made arguments regarding the legal effect of the appellee's admitted failure to pay rent in a timely fashion under Illinois contract law The Morrells paid rent for the two additional months, although the July rent, due June 17, was not paid until July 6. (*See. Goldstein v Lustig*, 154 Ill. App. 3d 595, 507 N.E2d 164, 168 (1987)(a party who breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract). After reviewing a tape of the argument before the Court, it appears that there was some confusion as to the $100 late payment liquidated damages provision in paragraph 3 of the lease rider. The argument in the appeal briefs was not that appellant was entitled to a $4400 penalty for late rental payment rather than the $100 agreed upon as liquidated damages. Rather, the point was that by failing to make timely rent payments (a fact admitted by appellees), the appellees' defaulted on the lease and were therefore in wrongful possession of the premises, triggering paragraph 8(c) of the lease which created a tenancy at sufferance at a reasonable rate per day. such as $120. because the appellees retained possession of the property after "termination of the term *or otherwise*." (See Exhibit A to Appellate Appendix No. 6, emphasis added.) Significantly, paragraph 8 of

the lease provided that a tenancy at sufferance would arise "if no such written notice is served." (Id.) The appeal briefs argued that appellees' admitted breach of the lease began a contractual tenancy at sufferance pursuant to which the appellees owed appellant a reasonable amount e.g. (61 days at $120 per day) against which the $4400 security deposit should be offset. (Appellant's Opening Br. 17-19.)

6. While the liquidated damages provision in the rider provided that damages caused by late payment would be $100, the provision made clear that this late charge would "in no event constitute a waiver of [Morrells'] default.... nor prevent [Generes] from exercising any of the other rights and remedies" provided by the lease, including the tenancy at sufferance provision of paragraph 8. (Exhibit A to Appellate Appendix No. 6) The appeal brief also contended that as a matter of Illinois law, appellees were estopped from enforcing the provisions of a contract they materially breached. (Appellant's Opening Br. 17.)

7. In addition, the arguments on appeal regarding the bankruptcy court's finding that an oral modification of the lease was created were not intended merely to challenge that court's determination that the appellees' were more credible than appellant, but rather, to show that the bankruptcy court had misapplied the burden of proof for the establishment of an oral modification under Illinois contract law. (See Appellant's Opening Br. 21-22; Reply 9-10) These were substantive, non-frivolous arguments that should not have been sanctionable under Rule 38.

8. The briefs and argument on behalf of appellant, which disclosed all of the standards applicable to the appeal, do not reflect any abusive conduct or the type of bad faith the Seventh Circuit Court has required before imposing sanctions. *See Flaherty v Gas Research Inst.*, 31 F.3d 451, 459 (7th Cir. 1994) (declining to impose Rule 38 sanction for appeal of Rule 11 sanctions and other issues that were not close because there was no indication that the appeal was pursued in bad faith); see also Fed. R. Civ. Proc. 11(b) Advisory Committee Notes (1993)(stating that arguments

specifically identified as arguments for a change of law should be viewed with greater tolerance). Rather, the briefs and arguments demonstrate a good faith effort to present legal issues -- including a matter of first impression for the Seventh Circuit--and sought to show that the court below applied the wrong burden of proof under Illinois law and that oral argument would have allowed appellant to remedy what he believed was an erroneous application of that law to the facts presented. Moreover, Ms. Dowd's agreement to undertake this appeal on a pro bono basis further demonstrates that this appeal was not made in bad faith. In any case, the opprobrium placed upon appellant, as well as Ms. Dowd, by this Court's published opinion is already a sufficient sanction. *See also Unanue-Casal v Unanue-Casal*, 898 F.2d 839, 842 (1st Cir. 1990) (public explanation of behavior itself constituted appropriate sanction under Federal Rule of Civil Procedure 110; *Pony Express Courier v Pony Express Deliver*, 872 F.2d 217, 319 (9th Cir. 1989) (same).

The Seventh Circuit's previous position that "Failure to prevail does not give rise to sanctions" is correct. *Kizer v. Childrens' Learning Center*, 962 F.2d 608, 613 (7th Cir. 1992). *see also D'Aguino v Citicorp/Diners Club, Inc.*, 139 F.R.D. 357(ND Ill. 1991)(holding failure on the merits is not "frivolousness").

There was no frivolous appeal to warrant $19,205.18 in sanctions against Tasker Generes personnally. Since Generes' was represented by an experience appellate attorney, Lynn D. Dowd, whether the appeal was frivolous was a legal determination to be made by her. She advised Generes that this was a meritorous case which should be appealed. She was Chairman of the Appeals Department at Cassiday, Shade, & Gloor. After she left the Cassiday firm for her present firm, she took along this appeal which she had been handling for the Cassiday firm, my former appellate attorneys. All in all, she tells me she has done over 200 appeals. A search on Lexis reveals many cases in which she was appellate counsel. She also teaches at a local law school. It is improper to

penalize the party on an issue of law. See amended Rule 11(c)(2)(A) "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)". The Seventh Circuit applies its Rule 38 in accordance with Rule 11. *Hill v Norfolk & Western Ry.* 814 F.2d 1192, 1200 (7th Cir. 1987) Thus, it is improper to sanction Generes, who was represented by counsel, on the legal issue of whether this was a frivolous appeal. This is particular true in light of the decision to impose no monetary sanction on Lynn D. Dowd.

In addition, the Seventh Circuit did not explain how and why it determined that $19, 205.18 is the minimum amount necessary to deter further frivolous appeals. Because the order was not published the Court could not be aiming this amount as a deterent to others. Amended Rule 11(c)(2) limits a sanction to: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct ..." Such an explaination is a necessary part of any such order so that it may be subject to meaningful review.

## III. Seventh Circuit's No Closing Argument Right Holding is Contrary to Supreme Court and Highest State Courts

The Seventh Circuit's decision that in civil suits involving issues of fact closing argument is only a privilege is contrary to this Court's own decision in *Federal Communications Commission v WJR, The Goodwill Station.* 337 U.S. 265, 277 (1949), which held that 5th Amendment due process rights to closing argument in an administrative proceeding must be decided on a case-by-case basis. Moreover, the U.S. Supreme Court has held a "hearing" is the hearing of evidence and argument. "If the one who determines the facts which underlie the order has not considered evidence **or argument**, it is manifest that the hearing has not been given." (emphasis supplied). *Morgan v United States*, 298 U.S. 468, 480; 56 S.Ct. 906, 911; 80 L.Ed. 1288. And, this Court said in *Hovey v Elliot*, 167 U.S. 409, 42L.Ed 215, 220-21, 17 S.Ct 841 (1987):

> Wherever one is assailed in his person or his property, there he may defend for the liability and the right are inseparable. This is a principle of natural justice recognized as such by common intelligence and the conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

Implicit in the failure to allow closing argument, is that Bankruptcy Appeal Rule 8013 should not be applied to the findings of the Bankruptcy Court below because the Court refused to allow closing argument. The Seventh Court has now rejected that limitation in favor of a general rule of privilege only.

The Supreme Court of the State of Kansas has held that counsel has an absolute right to closing argument. *Richa v Wichita Precision Tool Company*, 373 P.2d 201, 204-206 (1962), 190 Kan. 138 (1962).

> Our system of jurisprudence is founded on the proposition that every litigant has a right to be heard. The right to be heard carries with it the absolute right to be represented by counsel, and the right of counsel to assist the court by oral argument in analyzing the evidence and applying the law.

The Supreme Court of New Jersey has also held that the right of a party to present analysis of evidence and inferences claimed to be deducible therefrom to trier of facts, whether that tribunal be judge or jury, is subject only to reasonable limitation in exercise of a sound discretion. *Aladdin Oil Burner Corp. v Morton*, 187 A. 350 (N.J.Sup. 1936), 117 N.J.L. 260. The New Jersey Supreme Court held:

> The state of the case exhibits issues of fact; and, in this situation it was error for the judge, at the close of the

> case, to deny the right of summation asserted by appellant. This constituted an arbitrary deprivation of an absolute right, inherent in our system of trial procedure, rather than the exercise of a discretionary authority, reviewable only in the event of abuse-the right, of the very essence of the right of hearing answering her requirements of due process, to present an analysis of the evidence and the inferences claimed to be deducible therefrom to the trier of facts, be that tribunal the judge or a jury. It is, of course, subject to reasonable limitation in the exercise of a sound discretion. ... But limitation necessarily connotes the existence of this primary right. ... That tribunal' findings of fact on conflicting evidence are not reviewable on appeal. The judgement is accordingly reversed, and the record remitted for further proceedings not inconsistent with this opinion; costs to abide the event.

The Supreme Court of North Dakota has held that parties in nonjury civil cases have a right to present final argument. *Fuhrman v Fuhrman*, 354 N.W.2d 97, and examined precedent across the United States. The court quoted from the United States Supreme Court decision in *Herring v New York*, 422 U.S. 853, 863, 95 S.Ct. 2550, 2556, 45 L.Ed.2d 593 601 (1975):

> But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel. (citation omitted) And, as the same court points out in a footnote, closing argument in a bench trial may be even more important than in a jury trial, since a judge reaches his decision without the "stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury." 422 U.S. at 863, 95 S.Ct. at 2556, 45 L.Ed.2d at 601, fn. 15. While the Supreme Court was speaking in

the context of a criminal trial to the court, we believe the statements we have quoted are equally applicable to civil cases.

Notwithstanding *Korbelik v Stashke*, 232 Ill.App.3d 114, 173 Ill.Dec. 181, 184, 596 N.E.2d 805, 808 (1992), the Illinois Supreme Court has held in *Railway Passengers & Freight Conductors' Mutual Aid & Benefit Association v Robinson* (1893) 147 Ill 138, 159-60, 35 NE 168, 176 that the right to be heard is one dictated by the principles of natural justice. In *West Chicago Park Com'rs. v. Riddle* (1909) 151 Ill App 487, *aff'd* 245 Ill 168, 91 NE 1060, the court stated:

> Our Supreme Court has held that, in legal contemplation, the word 'hearing,' when used in connection with the trial of a lawsuit, includes not only the listening to the examination of the witnesses but the entire judicial examination of the issues, both of law and of fact, between the parties...Consequently the word embraces the listening to the arguments of counsel on both sides if oral arguments are made and the reading of the arguments if written or printed arguments are presented; and, also the consideration of these arguments in respect to both points of law and of fact. A less comprehensive meaning of the term would not give the parties such 'hearing' as they are entitled to under the law.

Because of the division in the views of the courts on the question of the right to a closing argument in a bench trial where fact questions have been raised, this Court should settle the conflict.

In the case at bar, there were issues of fact, which mandated that closing argument be permitted. Had the Seventh Circuit found a due process right to closing argument, it could not have found the appeal frivolous for challenging a factual finding.

Failure to allow closing argument substantially devalues attorneys services and places the judge in the role of both advocate and fact finder.

## IV. It is Unjust to Apply Old Rule 11 After Remedial Amendment Without Subject Matter Jurisdiction Even to Impose Rule 11 Sanctions.

The amended Rule 11 effective December 1, 1993 provide the following remedial changes:
1. The issue of Rule 11 sanctions shall be committed to the sound discretion of the court; 2. Alleged offenders shall have a 21-day safe harbor period in which the offending pleading or paper can be withdrawn without imposition of sanctions; 3. The guiding principle in sanctions enforcement is deterrence; courts are encouraged to fashion sanctions "sufficient to deter repetition of such conduct" 4. Normally any monetary penalty should be paid to the court to eliminate the profit motive in sanctions practice. 5. Sanction motions must be stand-alone applications.
The amendments to Rule 11 of the Federal Rules of Civil Procedure went into effect on December 1, 1993. By their terms, they govern "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 146 F.R.D. 404 (April 22, 1993)(Supreme Court order amending the Federal Rules of Civil Procedure). Several circuits have interpreted the "just and practicable" language broadly, holding that the amendments should be applied to pending case "to the maximum extent possible" so long as that application would not "work injustice." *Burt v Ware*, 14 F.3d 256, 259 (5th Cir. 1994); *see also Professional Programs Group v Department of Commerce*, 29 F.3d 1349 (9th Cir. 1994); *but see Diaz v Shallbetter*, 989 F.2d 850, 853 (7th Cir. 1993) and *Freund v Fleetwood Enterprises, Inc.*, 956 F.2d 354, 363 (1st Cir. 1992). Recently, however, *see Cleveland v Porca Co.*, 28 F.3d 289 (7th Cir. 1994). Also the "just and practicable" language has been construed to place the burden on the party who wants to apply the

old rule to show that it would not be "just and practical" to apply the amendment. *See Wilson v City of Atlantic City*, 142 F.R.D. 603, 605 (D.N.J. 1992)(because "'to the maximum extent possible, the amended rules should be given retroactive application'")(*quoting Skoczylas v Federal Bureau of Prisons*, 961 F.2d 543, 546 (5th Cir. 1992).)

As is a common problem with amended rules, the courts have split on if an old rule should still be applied to a pending decision on a case which was filed when the old rule was in effect. This is a recurring problem as a computer search "just w/3 practicable" will show.

This court has considered when to apply amended statutes recently in *Landgraf v USI Film Products et. al* , 114 S.Ct 1483; 128 L. Ed. 2d 229; 62 U.S.L.W. 4255. "Generally a court is to apply the law in effect at the time it renders its decision." *Bradley v. Richmond School Bd.*. 416 U.S. 696, 711 (1974). Indeed, at common law, statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil). were understood to preclude punishment for acts antedating the repeal. *See United States v Chambers*, 291 U.S. 217, 223-224 (1934). *Cf. DeGurules v INS*, 833 F.2d 861, 862-863 (CA9, 1987). Nevertheless, the circuits have split on Rule 11. The Seventh Circuit decision in *Matter of Generes*, 69 F.3d 821, Bankr. L. Rep. P76,689 (7th Cir. (Ill.), 1995) is contrary to *Knipe v Skinner* 19 F.3d 725 62 USLW 2670, 28 Fed.R.Serv.3d 420 (2nd. Cir. (R.I). 1994)). In *Knipe*, the Second Circuit took cognizance of the rule change and said:

> The amendment is effective December 1, 1993, and "applicable to all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Because Rule 11 sanctions should be imposed with caution, see, e.g. *Rodick*, 1 F.3d at 1351; *Morristown Daily Record v Graphic Comm. Local 8N*, 832 F.2d 31, 32n.1 (3rd. Cir. 1987), we conclude that a just and practicable application of the

amended Rule 11 requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version.

In *Matter of Generes*, the District Court's ruling came in 1994, so the District Court applied the amended rule. However, the 7th Circuit held that the old rule must be applied and remanded the case for the District Court to not apply the new rule but to apply the old rule But, *c.f. Elliott v Tilton*, 64 F.3d 213, 215 (5th Cir. 1995) (applying amended rule). However the Seventh Circuit gave no guidance on whether the measure of appropriate sanctions was to be determined using the measure under the amended rule or the old rule. *LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 436 (SDNY, 1995)(holding appropriate measure of sanctions for conduct found sanctionalble under old rule now governed by amended rule's meaure.) The Seventh Circuit may have failed to realize that this was the rule being applied by the District Court. The commentary to the new rule expressly allows the District Court not to explain a decision not imposing monetary sanctions. Because, rules of procedure are frequently being amended, the Circuit Courts should have a uniform rule for their application.

Nevertheless, the remand to impose old Rule 11 sanctions is in conflict with *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987)(holding District Court in role of Bankruptcy appeal lacks subject matter jurisdiction to impose Rule 11 or Rule 9011 sanctions), *c.f. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (holding that Rule 11 does not apply to appeals). The reason that there is not subject matter jurisdiction is that the Federal Rules of Civil Procedure are made explicitly inapplicable to "proceedings in bankrutpcy...except in so far as they may be made applicable thereto" by the Bankruptcy rules. Fed. R. Civ. P. 81(a)(1). Appeals to district courts in bankruptcy cases are governed by Part VIII of the Bankrukptcy Rules. Bankr. R. 8001-8019. Those rules do not contain any version of Rule 11. Although Part IX of the Bankrutpcy Rules does include a rule that

tracks rule 11 virtually word for word, Bankr. R. 9011, the term "court" as used in Rule 9011 refers to a "bankruptcy court." Bankr. R 9001(2). Hence, Rule 9011 governs only the initial proceeding in bankruptcy court. *In re Kamakani Services*, 125 Bankr. 819, 819-820 (Bankr. D. Hawaii, 1991). Thus the District Court has no subject matter jurisdiction to enter a Rule 11 sanction. This is another reason why the Seventh Circuit erred. Thus the District Court was correct to impose no monetary sanction under Rule 11.

## V. Imposition of Sanctions against Witnesses Not Believed By a Judge and Condemning Them as Perjurers Without Indictment Interferes with American Justice.

Generes, the landlord was a witness. He was examined by both his attorney and cross-examined. Judge Coar held that his conclusion depended on which side he believed otherwise the decision could go either way. Judge Coar decided that each side should bear its own costs. He made no finding that Generes had brought the litigation in bad faith. On the contrary, implicit in the order requiring each side to bear its own costs is the finding that Generes did not litigate in bad faith.

The Morrells never made a motion for sanctions against Generes in the Adversary Proceeding nor did they move that costs be imposed against Generes pursuant to Bankruptcy Rule 7054(b). Nor did they file a claim in the Bankruptcy case prior to confirmation of the Plan of Reorganization seeking attorneys fees as required by Bankruptcy Rule 7008(b). Nor did they move the Bankruptcy Court within 180 days to amend the confirmed plan (which had been immediately substantially consummated by obtaining a loan from Citibank prior to the trial of the adversary proceedings) to allow a claim for attorneys fees.

Nevertheless, by way of an cross-appeal to the District Court, Morrells first raised the issue of costs and attorneys fees post-confirmation. Morrells sought attorneys fees which were

barred by the confirmed and substantially consummated Plan of Reorganization.

On the cross-appeal, the District Court concluded that Generes was tantamount to a perjurer in the Bankruptcy Court because the Bankruptcy Judge had not credited his testimony.

The Seventh Circuit reviewing this reversal by the District Court of the Bankruptcy Court, on an abuse of discretion standard, found no error. This Court's rule conflicts with the Fifth Circuit's decision in *Rodrigues-Gutierrez v. INS*, 59 F.3d 504, 507-508 (5th Cir. 1995):

The Fifth circuit, quoting a decison from the Ninth Circuit, held that to assume:

> a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character... is not only legally invalid, but is contrary to the basic sense of fairness upon which our legal system is founed. (citation omitted). The BIA incorrectly concluded that Rodriguez was not a person of good moral character, because it erroneously held that a finding that testimony lacks credibility is the equivalent to a finding that the witness has given false testimony.

Thus, the rule is established in the Seventh Circuit the an adverse credibility finding subjects a person to sanctions notwithstanding that the Trial Judge made no finding of bad faith against the party and no trial or indictment was held on the crime of perjury. This is contrary to *Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 1945 (1994) and *Alyeska Pipeline and Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). To use the Court's inherent power in this fashion is manifestly unjust.

The Seventh Circuit cited the following from the District Court's order as the conduct in the Bankruptcy Court to be sanctioned, Matter of Generes, 69 F.3d 821, 826 (7th. Cir. 1995):

> In the instant case, the record reflects that Generes' conduct rivals that of the defendant in Chambers, who not only filed false and frivolous pleadings, but committed perjury and harassed his opponents. Furthermore, Generes used these proceedings as a vehicle for making serious and scandalous allegations which are totally bereft of any basis in fact or law, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith. Generes also improperly disclosed the contents of settlement negotiations and accused the trial judge of improper ex parte communications with opposing counsel without any substantiation whatsoever.

Based on this the Seventh Circuit held:

> As the District Court described above, Generes's filings and actions in this matter were characterized by unsubstantiated accusation. Based on the facts of this case as well as the case law applicable theeto, we hold that the district court acted withint its discretion in imposing sanction for Generes's conduct in the Bankruptcy Court.

However, this Court should read the pleadings and the Bankruptcy Court trial transcript. (Appendix B) Look at the Adversary Complaint. it was not false or frivolous. there is no conviction of the crime of perjury for Generes. discovery consisted of one brief deposition of each party. There was no harassment by Smith Williams & Lodge, Generes', attorneys or Generes. Generes was a deposition witness and a trial witness. A witness has absolute judicial immunity for trial testimony. *Scheidler v National Organization for Women, Inc.*, 739 F. Supp. 1210, 1215-17 (ND Ill. 1990). But, Generes does not need immunity for his conduct in the Bankruptcy trial: look at the Bankruptcy Court Adversary

Complaint and Generes' trial testimony. Neither Generes nor his attorneys' Adversary Complaint or trial testimony contain claims that Morrells committed arson and insurance fraud and objected to his reorganization plan in bad faith. Nor did Generes' trial testimony improperly disclose the contents of settlement negotiations nor accuse the trial judge of improper ex parte communications with opposing counsel. Thus, it is improper for a sanction to be imposed for such conduct in the Bankruptcy Court.

Imposing sanctions for non-existent conduct in the Bankruptcy Court is a travesty of justice calling for the Supreme Court to exercise its supervisory authority.

**VI. No Core Subject Matter Jurisdiction in The Bankruptcy.**

Subject matter jurisdiction cannot be waived and may be challenged by a party or raised sua sponte by the court at any point in the proceedings. *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1055 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

Chapter 11 plan confirmation discharges all claims or merges them into the plan, and removes a debtor's property from the bankrutpcy estate and revests it in the debtor pursuant to Code Section 1141(b) and (c), along with normal ownership rights. *In re NTG Industries*, 118 Bankr. 606 (W.D. Wis. 1986). *In re Crystal Manufacturing*, 60 Bankr. 818, 820 (N.D. Ill., 1986) (bankruptcy court had no subject matter jurisdiction to adjudicate the claim). Jurisdiction in bankruptcy is not forever. It lapses upon confirmation. Otherwise anyone who could trace his claim to a bankrupt could invoke federal jurisdiction to settle disputes. *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987). Thus, although the initial pleading were filed before confirmation and discovery was conducted before confirmation and debtor's claim for property damage was voluntarily dismissed prior to confirmation, jurisdiction ceased before trial which occurred after confirmation and substantial consumation by closing on the Citibank loan.. *In re Chicago, Rock Island and Pacific Railroad Co.*, 794 F.2d 1182, 1186 (7th Cir. 1987) ("The court's jurisdiction lapses on plan

confirmation). And confirmation bars claims that could have been made before confirmation.

Although the Plan purports to retain jurisdiction by the Bankruptcy Court to determine any disputed claims (see App. D. Plan p.7). Confirmation merged all claims into the Plan. *In re Au*, 123 Bankr. 31, 33 (Bankr. N.D. Ohio 1990) ("While the court may properly retain jurisdiction over post-confirmation matters under 11 U.S.C. 1142(b) pursuant to a plan provision, it may not expand its jurisdiction merely by asserting it in a reorganization plan."). The objective for bankruptcy is to get it over quickly and start anew.

At most, a post-confirmation adversary proceeding is a non-core proceeding. *In re Lawndale Steel Co., Inc.*, 1991 Bankr. LEXIS 1665. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Article I judges can not hear and issue final orders on rights created by state law). "Adversary" was a state landlord-tenant matter. In non-core proceedings heard pursuant to 28 U.S.C. Section 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. Since a report and recommendation has not been made yet, appellate jurisdiction is nonexistant.

## SUMMARY

In summary, the Supreme Court should reverse because the Seventh Circuit's holding chills appellate and trial advocacy. It is contrary to existing Supreme Court precedent, and the Seventh Circuit's own precedent and in conflict with the other Circuits. It unreasonably construes the Rules Enabling Act, and limits an appellant's appeal rights contrary to 28 USC § 1821. And, not the least, erroneously changes underlying risks involved in contract enforcement.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tasker O de Generes
*Counsel of Record for Petitioner*
1845 Happ Road, Northbrook, IL 60062

## APPENDIX

### I. Order on Petition for Rehearing, March 21, 1996.

On consideration of the Tasker Generes Petition for Rehearing and Suggestion for Rehearing in Banc filed March 6, 1996, which the Court construes as a Petition for Rehearing, see L.O.P. 1(a)(2), it is ordered the suggestion is denied.

### II. Order on Rule 38 Notice, February 21, 1996.

These matters come before the Court:

1. "DEFENDANTS--APPELLEES-CROSS-APPELLANTS, EDWARD AND PATRICIA MORRELL SUBMISSION ON ATTORNEYS' FEES AND UNTAXABLE COST" filed on November 17, 1995, by counsel;

2. "RESPONSE OF LYNN DOWD, ESQ., TO COURT'S RULE 38 NOTICE" filed on November 20, 1996, by counsel;

3. "PLAINTIFF-APPELLANT TASKER GENERES' RESPONSE TO COURT'S RULE 38 NOTICE" filed November 20, 1995, by counsel;

4. "DEFENDANTS-APPELLEEES-ROSS-APPELLANTS, EDWARD AND PATRICAI MORRELL FURTHER SUBMISSION ON ATTORNEYS' FEES" filed on January 22, 1996, by counsel.

IT IS ORDERED that Edward C. Morrell and Patricia Morrell are awarded $19,205.18 in attorneys' fees and costs under Federal Rule of Appellate Procedure 38. The award is against Tasker Generes, personally.

Supreme Court, U.S.
FILED
95 2 0 4 9 JUN 1 8 1996
OFFICE OF THE CLERK

No.__

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

# APPENDIX "A"
# TO
# PETITION FOR WRIT OF CERTIORARI

I. SEVENTH CIRCUIT OPINION
II. DISTRICT COURT OPINION
III. BANKRUPTCY COURT ORDERS ON NEW TRIAL MOTION
IV. MOTION FOR NEW TRIAL

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June 19, 1996

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## I.

**IN THE MATTER OF: DOROTHY GENERES, Debtor, and TASKER GENERES, Debtor-Appellant.**
**IN THE MATTER OF: DOROTHY GENERES and TASKER GENERES, Debtors-Appellees. APPEAL OF: EDWARD L. MORRELL and PATRICIA MORRELL**

No. 94-1647, No. 94-2213

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

69 F.3d 821; 1995 U.S. App. LEXIS 31339; Bankr. L. Rep. (CCH) P76,689

April 17, 1995, Argued November 3, 1995, Decided

SUBSEQUENT HISTORY: [*1]

Counsel Amended January 17, 1996.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 5884. George M. Marovich, Judge.

COUNSEL: For EDWARD L. MORRELL, PATRICIA MORRELL, Appellees (94-1647), Appellants (94-2213): David B. Kahn, Mark E. King, KAHN & ASSOCIATES, Northfield, IL.

For TASKER GENERES, Debtor - Appellant (94-1647): Christopher R. Smith, SMITH, WILLIAMS & LODGE, Chicago, IL. Lynn D. Dowd, LEVIN, MCPARLAND, PHILLIPS, LEYDIG & HABERKORN, Chicago, IL.

For TASKER GENERES, Debtor - Appellee (94-2213): Lynn D. Dowd, LEVIN, MCPARLAND, PHILLIPS, LEYDIG & HARBERKORN, Chicago, IL.

JUDGES: Before CUMMINGS, COFFEY and EASTERBROOK, Circuit Judges.

OPINIONBY: COFFEY

OPINION: COFFEY, Circuit Judge. The dispute in this case arises from an adversary proceeding in the bankruptcy court concerning a two-month extension of a lease for a family home owned by the debtor, Tasker Generes, and rented to Edward and Patricia Morrell (the Morrells). The bankruptcy court determined that an oral agreement had been made between Generes and the Morrells to extend the lease. Generes appealed to the district court and lost; he now appeals to this court. The Morrells appeal the district court's decision not to impose sanctions in the form of attorneys' fees against Generes for filing a frivolous appeal in the district court. We affirm in part and reverse in part, and impose sanctions against Generes for pursuing a frivolous appeal in this court.

I. Background

The Morrells occupied and owned a family home in Northfield, Illinois, that was partially destroyed by fire in December 1990. No one was injured and the house was temporarily uninhabitable, but the [*2] Morrells and their four children were forced to find temporary housing while the repair work was being completed. Authorized by their insurance company and aided by an attorney, the Morrells signed a six-month lease with Tasker Generes to rent a home owned by Generes in Northbrook, Illinois. Generes, a practicing attorney for almost twenty years, resided next door.

The lease was for a term of six months and provided for a monthly rent of $ 2200, to be paid by the 18th of the preceding month, and a security deposit of $ 4400. Under the six-month term of the agreement, the Morrells were to vacate the premises by June 17, 1991. However, the lease contained a holdover provision in the event that the Morrells remained in possession of the house beyond the lease's original term. n1 The Morrells paid the security deposit and first month's rent and moved in on December 18, 1990.

----------Footnotes----------

n1 The holdover provision provided: If the Lessee retains possession of the Premises or any part thereof after the termination of the term by lapse or otherwise, then the Lessor may at the Lessor's option within thirty days after the termination of the term serve written notice upon Lessee that such holding over constitutes either (a) renewal of the lease for one year, and from year to year thereafter, at double the rent specified under Section 1 for such

period, or (b) creation of a month to month tenancy, upon the terms of this lease except at double the monthly rent specified under Section 1, or (c) creation of a tenancy at sufferance, at a rental of [blank] dollars per day for the time Lessee remains in possession. If no such written notice is served then a tenancy at sufferance with rental as stated at (c) shall have been created. Lessee shall also pay to Lessor all damages sustained by Lessor resulting from retention of possession by Lessee.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*3]

There is no dispute that for the six month term of the original written lease, the Morrells paid each month's rent on time, usually by dropping off the rent-check at the Generes residence next door. However, the Morrells did not vacate the house by June 17, 1991, as originally agreed, but remained in possession for another two months pursuant to an oral agreement with Generes, the existence of which Generes denies. The Morrells paid rent of $ 2200 for the two additional months, although the July rent, due June 17, was not paid until July 6.

The Morrells vacated the premises on August 18, 1991 and contacted Generes about the return of their $ 4400 security deposit. Generes did not return the security deposit.

In late August 1991, Generes filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and the Morrells filed a timely claim for the return of the $ 4400 security deposit. Generes disputed the claim and filed an adversary proceeding against the Morrells in bankruptcy court, seeking eight months of unpaid rent and $ 8000 of alleged property damage. n2 In his complaint, Generes alleged that there had been no oral agreement to extend the lease, but instead a [*4] holdover tenancy had been created by the Morrells remaining on the property, which obligated the Morrells to pay twelve months of rent according to the holdover provision in the written lease. n3 Further, Generes asserted that on July 1, 1991, he delivered a letter to the Morrells in which he exercised his right under the terms of the written lease to create the holdover tenancy.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Generes alleged that the Morrells's children had caused damage to the interior walls of the property. However, two weeks

before trial, the bankruptcy court granted Generes's request to voluntarily dismiss the property damages claim.

n3 Generes's claims against the Morrells under the lease totalled $ 27,027 plus attorneys fees and other costs.

----------End Footnotes----------

On June 30, 1993, the bankruptcy court held a hearing on the matter, receiving testimony from Generes, the Morrells, and the Morrells's contractor. According to the Morrells, in the spring of 1991, the contractor who was repairing their home informed them that the work would not be completed [*5] until mid-August. The Morrells testified that they then contacted Generes and requested and received a two-month extension of their lease at the same rate.

Generes testified that no such oral agreement was made. Further, he stated that the first action taken was on July 1, 1991, when he prepared a letter to the Morrells, in which he exercised his right to create a holdover tenancy for a term of one year due to the Morrells' continued occupancy of the property. However, Generes conceded that he did not mail the letter or hand-deliver it to anyone at the rental property, but instead dropped it inside the Morrells' unlocked front door.

Recognizing that the decision boiled down to a credibility determination, the bankruptcy court made the following findings:

I have listened to all of the witnesses and I have observed their demeanor in court. I will find that in fact, there was an agreement between Mr. Generes and the Morrells whereby the original period of the lease was extended for two months and two months only. That notice was not delivered to the Morrells on July 1.

The placing of the notice on the floor in the house is not delivery of the notice, and nor was the intent [*6] to treat them as holdover tenants in any way communicated to the Morrells during the periods at issue. That's up through and including June 1992.

The Morrell's testimony makes it clear. I believe Mr. Generes understood that the Morrells were only interested in renting until such time as their house was repaired. Given that their failure to respond to the alleged notice of July 1, 1991, would seem to raise a real issue to Mr. Generes as to what was going on. He understood that they didn't intend to live in this property forever, and they certainly understood that.

I just cannot understand why he assumed that their failure to respond to this alleged notice was an agreement on their part of his right to treat them as a hold-over tenant. That's simply inconsistent with all of the circumstances of the case, and I just don't think that the delivery of the notice was reasonable under the circumstances. Nor, in fact, do I believe the notice was delivered at all or prepared at all.

Generes filed a motion for a new trial, which was denied, and he then appealed to the district court, claiming that the bankruptcy court had erred both in finding that an oral agreement had extended the lease [*7] and in refusing Generes an opportunity to present closing arguments. The Morrells cross-appealed, seeking attorneys' fees and costs.

The district court affirmed the bankruptcy court's findings. Also, the district court determined that Generes's action in the bankruptcy court warranted sanctions either under Fed. R. Civ. P. 11 (or its equivalent Bankruptcy Rule 9011) or under the court's inherent power to sanction bad-faith conduct, and it awarded attorneys' fees and costs for the Morrells, remanding the case to the bankruptcy court to determine the appropriate amount. n4 The Morrells then filed a motion for attorneys' fees as a sanction for Generes's appeal from the bankruptcy court, which the district court denied without stating any reasons. Generes appeals the district court's decision, and the Morrells cross-appeal, seeking the award of sanctions for Generes's conduct in the district court as well as his pursuit of a frivolous appeal in this court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 The remand has been stayed pending disposition of the appeal in this court.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*8]

II. Analysis

Generes asks this court to reverse the bankruptcy court's factual finding that he and the Morrells orally agreed to extend the term of the written lease. Under Bankruptcy Rule 8013, this court reviews the bankruptcy court's findings of fact for clear error. In re Lloyd, 37 F.3d 271, 274 (7th Cir. 1994); In re Tolona Pizza Products Corp., 3 F.3d 1029, 1034 (7th Cir. 1993) ("The district court must accept the bankruptcy court's findings of fact unless they are

clearly erroneous. The court of appeals also must restrict its review of factual findings to this narrow standard.") (quoting In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985)).

Generes argues, essentially, that the bankruptcy court should have believed his testimony and not that of the Morrells. However, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Anderson v. Bessemer City, 470 U.S. 564, 575, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). Generes seeks a pure review of credibility: he presents [*9] no extrinsic evidence that would undermine the trial court's decision to choose the Morrells's version of events over that presented by Generes. Although Generes seeks to persuade us that his version of events is more believable, our role is not to reweigh the evidence or make de novo factual determinations. Dunning v. Simmons Airlines Inc., 62 F.3d 863, 868 (7th Cir. 1995) ("We refuse to second-guess the court's credibility determinations because the judge has had the opportunity to observe the verbal and nonverbal behavior of the witnesses focussing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements, rather than looking at the cold pages [of a transcript]."). Other than rearguing his own version of the facts, Generes has offered neither caselaw nor any facts or circumstances much less logical reasoning why we should disturb the credibility determinations of the bankruptcy court. Accordingly, we affirm the district court's decision to affirm the bankruptcy court's finding that the parties made an oral agreement to extend the lease for an additional two months.

Generes contends [*10] that even assuming that an oral agree ment extended the lease, the Morrells were 18 days late with the rent payment for the first month of the two month extension. This tardiness, Generes argues, caused a breach of the lease and wrongful possession of the property. Generes's argument is misguided. The oral agreement extended the written lease for two months, and under the terms of the written lease late payment does not result in forfeiture of the property.

Turning from the merits of the case, Generes maintains that the bankruptcy court denied him the constitutional right to present closing arguments. Although closing arguments are required in a criminal case under the Sixth Amendment's right to effective assistance of counsel, Herring v. New York, 422 U.S. 853, 45 L. Ed. 2d 593, 95 S. Ct. 2550 (1975), Generes has supplied no authority for the proposition that closing arguments are a constitutional right in civil cases and nor have we been able to find any. Indeed, Illinois courts have held that "oral argument in a civil proceeding tried before a court without a jury is a privilege, not a right, which is accorded to the parties by the court in its discretion." Korbelik v. Staschke, 232 Ill. App. 3d 114, 596 N.E.2d 805, 808, 173 Ill. Dec. 181 (Ill. App. [*11] 1992). Further, Generes has provided no historical argument or persuasive justification why the Due Process Clause of the Fifth Amendment should be read to require closing arguments at his trial: a four-hour hearing in bankruptcy court.

Finally, Generes and the Morrells dispute the district court's disposition of sanctions. Generes claims the district court erred in awarding attorneys' fees and costs for the bankruptcy proceeding; the Morrells argue the district court did not go far enough and that they deserve attorneys' fees for Generes's conduct in the bankruptcy court, as well as in the district court and the court of appeals.

Although the district court found that Generes's conduct warranted sanction under Rule 11 of the Federal Rules of Civil Procedure (or its equivalent bankruptcy rule 9011), the court determined that the full range of Generes's conduct was not covered by the federal rules, and therefore the court invoked its inherent power to award attorney's fees as a sanction for bad faith litigation. See Chambers v. NASCO Inc., 501 U.S. 32, 33, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) ("the court may safely rely on its inherent power [to impose attorney's fees as a sanction] if, in its informed discretion, [*12] neither the statutes nor the rules are up to the task."). In holding that the court's inherent power should be levied against Generes, the district judge stated:

In the instant case, the record reflects that Generes' conduct rivals that of the defendant in Chambers, who not only filed false

and frivolous pleadings, but committed perjury and harassed his opponents. Furthermore, Generes used these proceedings as a vehicle for making serious and scandalous allegations which are totally bereft of any basis in fact or law, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith. Generes also improperly disclosed the contents of settlement negotiations and accused the trial judge of improper ex parte communications with opposing counsel without any substantiation whatsoever.
(Order at 22).

Generes argues that sanctions should not have been imposed for his conduct in the bankruptcy court. We review the imposition of such sanctions for an abuse of discretion. Matter of Excello Press Inc., 967 F.2d 1109, 1112 (7th Cir. 1992) (sanctions imposed under bankruptcy rule 9011 reviewed for an abuse of discretion); [*13] Chambers, 501 U.S. at 50 (a federal court's inherent power to sanction bad faith conduct is reviewed for an abuse of discretion). As the district court described above, Generes's filings and actions in this matter were characterized by unsubstantiated accusation. Based on the facts of this case, as well as the caselaw applicable thereto, we hold that the district court acted within its discretion in imposing sanction for Generes's conduct in the bankruptcy court.

The Morrells argue that the district court should also have imposed sanctions for Generes's appeal to the district court, as well as for his actions in bankruptcy court. In evaluating Generes's conduct, the district court determined that Generes had violated Rule 11 of the Federal Rules of Civil Procedure because the appellate brief filed by Generes in the district court was devoid of reasonable inquiry into either the facts or law of the case, and the district judge stated that "Generes fills his 33 pages with equal parts irrelevance, innuendo, conjecture and other unsupported legal and factual assertions." Moreover, the district court continued, "the briefs which Generes submitted to this court are poorly organized, replete [*14] with typographical and grammatical errors, and sorely lacking in relevant legal authority." Although Generes acted pro se, the district court found that he was a licensed attorney who had practiced law for twenty years. However, despite finding that Generes had specifically violated

Rule 11, the district court in the exercise of its discretion declined to impose sanctions.

Our analysis of the district court's denial of sanctions is complicated by the amendment to Rule 11, which took effect while the action was pending before the district court.

The old version of Rule 11 provides, in relevant part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary [*15] delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction."

Fed. R. Civ. P. 11 (1993) (emphasis added).

Taking effect on December 1, 1993, the amended version of Rule 11 governs "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 146 F.R.D. 404 (Apr. 22, 1993) (Supreme Court order amending the Federal Rules of Civil Procedure). The amended version provides, in relevant part:

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses and other legal contentions [*16] therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . . (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b)

has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. Fed. R. Civ. P. 11 (1994) (emphasis added). "Thus, under the amended version, the imposition of sanctions for a Rule 11 violation is discretionary rather than mandatory." Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994). See also Cunningham v. Waters Tan & Co., 65 F.3d 1351, 1360 (7th Cir. 1995); Land v. Chicago Truck Drivers Union, 25 F.3d 509, 515 (7th Cir. 1994).

We have held that applying the amended version of Rule 11 to pending cases is not "just and practicable" where the conduct, motions, and decision of the district court occurred before the December 1, 1993, effective date. See Cunningham, 65 F.3d at 1361 ("Plaintiffs' counsel's conduct should be judged under the standards applicable when the action took [*17] place."); Land, 25 F.3d at 516 ("Both at the time Land filed his complaint and when the Fund moved for sanctions, the old Rule 11 was in effect, and both parties were presumably operating under the standards and procedures propounded in that rule. Counsel's conduct should therefore be judged under those standards."). In this case, Generes's opening brief was filed November 15, 1993, before the effective date. Although the district court's decision and the Morrells's motion for sanctions were filed after December 1, 1993, the district court applied the old version of Rule 11 when concluding Generes had committed sanctionable conduct. We believe that it is just and practicable to apply the version of Rule 11 that the district court itself applied and was in effect at the time Generes appealed from bankruptcy court and filed his brief in the district court, that is, the old version of the Rule.

The district court's initial determination that Rule 11 had been violated is reviewed for an abuse of discretion. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc). Because of the frivolous nature of Generes's appeal from the bankruptcy court, as described [*18] above by the district court, we hold that there was no abuse of discretion in finding that Generes had failed to make a reasonable inquiry into the law and facts of the case, including Generes's unsubstantiated allegations against the Morrells. Therefore, under the old version of Rule 11,

sanctions are mandatory once the district court has identified a violation. Cunningham, 65 F.3d at 1360. Because the district court did not impose sanctions for the conduct that it found violated Rule 11, we remand the case to the district court for the imposition of an appropriate sanction. See Ross v. City of Waukegan, 5 F.3d 1084, 1088 (7th Cir. 1993) ("the imposition of sanctions, when Rule 11 had been violated, is mandatory."). n5

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n5 Further, even if we were to apply the amended version of Rule 11, we believe that the district court abused its discretion in that it found Generes's behavior was egregious and sanctionable, and yet it denied sanctions without explanation. See LaSalle Nat. Bank v. County of DuPage, 10 F.3d 1333, 1338 (7th Cir. 1993) ("We have held that a district court abuses its discretion when it denies sanctions without explanation."). Although a deferential standard of review is required for Rule 11 determinations, this review "is not toothless." Land, 25 F.3d at 515.

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Finally, the Morrells ask us to sanction Generes for pursuing a frivolous appeal in this court. As well as appealing the imposition of sanctions, Generes requested us to overturn a well-supported credibility determination of the bankruptcy court. With regards to the district court's decision that Generes had engaged in frivolous and sanctionable conduct before it and the bankruptcy court, "courts of appeals have ample authority to protect the beneficiaries of Rule 11 sanctions by awarding damages and single or double costs under Rule 38--which they may do . . . when the appellant had no reasonable prospect of meeting the difficult standard of abuse of discretion." Kale v. Obuchowski, 985 F.2d 360, 363 (7th Cir. 1993) (quoting Cooter & Gell v. Hartmarx Co., 496 U.S. 384, 408, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)).

An appeal is frivolous when "the result is foreordained by the lack of substance to the appellant's arguments." Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc). Generes has offered no justification for his conduct in the district court, other than to re-assert his own version of the facts, arguing that we should believe him and not the Morrells. We have previously [*20] held such appeals frivolous and sanctionable. See Rennie v. Dalton, 3 F.3d 1100, 1111 (7th Cir. 1993)

("Accordingly, we believe Rennie's appeal was frivolous as all she did was restate and reargue facts and credibility issues previously ruled upon in the district court."). Although we reserve the discretion to withhold sanctions, Colosi v. Electri-Flex Co., 965 F.2d 500, 504 (7th Cir. 1992), in Generes's case we conclude that the substance of the appeal is clearly frivolous and sanctions are appropriate. Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Generes shall submit a response to the question of the amount of sanctions imposed to the clerk of this Court within fifteen days of the date of this opinion. Counsel for the Morrells shall also submit to the clerk of this Court within fifteen days an accounting of attorney's fees and costs incurred in this appeal.

The judgment of the district court is AFFIRMED in part and REVERSED in part.

## II.

**IN RE: TASKER GENERES and DOROTHY GENERES,**
**Joint Debtors.**
**TASKER GENERES, Plaintiff-Appellant-Cross-Appellee,**
**v.**
**EDWARD L. MORRELL and PATRICIA MORRELL,**
**Defendants-Appellees-Cross-Appellants**
**93 C 5884**
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
165 Bankr. 1011; 1994 U.S. Dist. LEXIS 3138
March 10, 1994, Decided March 15, 1994, Docketed
PRIOR HISTORY: [**1] Appeal from Adv. No. 92 A 1283, Chapter 11, 91 B 17220, Judge Coar
JUDGES: MAROVICH
OPINIONBY: GEORGE M. MAROVICH
OPINION: [*1014] MEMORANDUM OPINION AND ORDER

Joint debtors Tasker and Dorothy Generes ("Generes"), filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Plaintiffs Edward and Patricia Morrell ("the Morrells") filed a claim for the return of a security deposit pursuant to the terms of a written lease agreement with debtors. Generes counterclaimed, contesting Morrell's security deposit claim and requesting property damages, unpaid rent, and late fees incurred during a purported holdover tenancy by the Morrells. The question presented before the Bankruptcy Court was whether the Morrell's two-month stay beyond their six-month written lease ("lease") was under the terms of an oral extension as the Morrells claimed, or an unauthorized holdover, as Generes alleged. The Bankruptcy Court questioned the credibility of Mr. Generes' testimony and the existence and delivery of a holdover notice allegedly prepared by Generes. Consequently, the Bankruptcy Court granted the Morrell's security deposit claim and denied Generes' counterclaim for unpaid rent and damages. [**2] The Bankruptcy Court stipulated that each party was to bear his own costs. Generes appealed the Bankruptcy Court's decision, claiming that the trial court abused its discretion in finding that an oral agreement modified and extended the terms

of the original written lease such that no holdover tenancy was created. Generes also claimed that the trial court erred in refusing to allow Generes' closing argument. The Morrells cross-appealed, claiming that the trial court abused its discretion by failing to award the Morrells costs and attorney's fees inasmuch as Generes, an attorney who represented himself pro se, had perjured himself during the bankruptcy proceeding. For the reasons set forth below, we deny Generes' claim that the trial court abused its discretion in finding that an oral lease was created and in denying Generes' request for closing argument. We grant the Morrell's request for costs and attorney's fees pursuant to the trial court proceedings. We therefore remand this case for determination of appropriate costs and attorneys' fees.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statement of Facts

The Morrells owned a home at 2324 Clover Lane, Northfield, Illinois, which [**3] was partially destroyed by fire on December 15, 1990, when a candle ignited a wreath. The Morrells had previously arranged to have their home remodeled, and notified the contractor of the fire damage.

The Morrell's insurance company authorized them to lease temporary housing because repairs were estimated to take several months to complete. Aided by their attorney, the Morrells entered into a written lease with Generes for the rental of a home located at 1829 Happ Road, Northbrook, Illinois. Generes, a practicing attorney for almost twenty years, resided next door. The lease covered a six-month period from December 18, 1990, through June 17, 1991, with rent of $ 2200 payable on the 18th of each month. The lease contained a clause which provided that the time of each payment was of the essence. The lease also contained a holdover provision in the event that the tenants remained in possession beyond the agreement's term. n1

----------Footnotes----------

n1 The holdover provision provided that: If the Lessee retains possession of the Premises or any part thereof after the termination of the term by lapse or otherwise, then the Lessor may at Lessor's option within thirty days after the termination of the term serve written notice upon Lessee that such holding over constitutes either (a) renewal of this lease for one year, and from year to year

thereafter at double the rent specified under Section 1 for such period, or (b) creation of a month to month tenancy, upon the terms of this lease except at double the monthly rent specified under Section 1, or (c) creation of a tenancy at sufferance, at a rental of [blank] dollars per day for the time Lessee remains in possession. If no such written notice is served then a tenancy at sufferance with rental as stated at (c) shall have been created. Lessee shall also pay to Lessor all damages sustained by Lessor resulting from retention of possession by Lessee.

----------End Footnotes---------- [**4]

After delivering their first check for $ 6600 to Generes, comprised of the first month's rent and a $ 4400 security deposit, the Morrells [*1015] moved into the rental premises on December 18, 1990. All six payments from December 18, 1990 through May 19, 1991 were made on time and delivered to Generes' door by either Mrs. Morrell or her children. However, the Morrells did not vacate the rental property by June 17, 1991, in accordance with the written lease. Before the expiration of the lease, the Morrells testified that they learned that they would be unable to return to their home in June of 1991 as planned because construction of their home was behind schedule. The Morrells testified that they reached an oral agreement with Generes to extend the lease for two months when construction of their home was to be completed. According to the Morrells, the oral lease stemmed from a phone conversation made by Mr. Morrell to Generes' home at an uncertain date in July of 1991. The Morrells subsequently negotiated with their insurance company for reimbursement of their living expenses at the rental property for two additional months.

Nonetheless, the Morrells did not pay July rent, due on June 18, [**5] 1991, until July 6, 1991. In her testimony Mrs. Morrell stated that the payment was late because of an out-of-town trip and was "a simple oversight." The Morrells paid their August rent on time on July 21, 1991, and vacated the premises on or about August 17, 1991. On several occasions thereafter the Morrells contacted Generes about the return of their security deposit. According to the Morrells, Generes informed them that the return

of the deposit would be complicated by the fact that he had filed for bankruptcy protection.

Generes denied that he entered into an oral agreement with the Morrells. Generes testified that he wrote and delivered a letter to the Morrells on July 11, 1993, in which he notified the Morrells that Generes had elected to treat the lease as a holdover. Generes testified that he delivered the letter by tossing it on the floor of the rental property and then returning home. Although Generes attached a copy of the letter in question to his complaint, the Morrells deny ever receiving the notice. The notice informed the Morrells that Generes was holding them for a renewal term of one year, but that he would waive doubling the rent.

Generes subsequently claimed that [**6] the Morrells were liable to Generes both for unpaid rent and late fees in excess of $ 20,000 for the ten-month period after the Morrells vacated the premises. Generes further alleged that the Morrells physically damaged the property by an amount in excess of $ 8000 during the eight months they occupied the property. The property damage included $ 3000 in labor for repainting the interior of the home and the replacement of a bathroom fan and fir tree. However, Generes admitted that he did not inform the Morrells of the property damage prior to instituting the bankruptcy lawsuit, and he subsequently dismissed the property damage claims with prejudice within two weeks of the trial date. Moreover, in his testimony Generes admitted that he also failed to raise the issue of the holdover with the Morrells until he filed suit, and that he never attempted to collect the overdue rent and late fees which allegedly accrued after the Morrells left the rental property.

II. Procedural History

On August 14, 1991, several days before the Morrells moved from the rental property, Generes filed a voluntary petition for bankruptcy under Chapter 11. On September 6, 1991, Generes scheduled the Morrell's [**7] claim as disputed and described it as a holdover tenancy. Shortly thereafter, on September 21, 1992, the Morrells filed a claim in Bankruptcy Court for the return of their security deposit in the amount of $ 4400, which was scheduled as a disputed claim. Generes contested the claim and counterclaimed on the basis of the letter he allegedly wrote to the Morrells. In his complaint, Generes alleged that: 1) a holdover

tenancy had been created when the Morrells stayed an additional two months at the property; 2) the Morrells owed him a monthly late fee for unpaid rent during the purported holdover tenancy for the ten months after they left the property; and (3) that the Morrells had done over $ 8000 of physical damage to the property.

After a hearing on June 30, 1993, during which each of the parties and additional witnesses [*1016] testified, the Bankruptcy Court found that Generes had not in fact written or delivered the letter purporting to create the holdover tenancy, and that the parties had instead orally agreed to extend the lease for two months. Consequently, the Bankruptcy Court entered an order on July 15, 1993, granting the Morrell's their security deposit and denying Generes' counterclaim [**8] for rent and fees due to an alleged holdover tenancy. The Court stipulated that each party was to bear his own costs of litigation.

On July 26, 1993, Generes filed a motion for a new trial, which was stricken two days later for Generes' failure to notice the motion for a date certain pursuant to Local Rule 12. The order was entered on the court's docket on August 12, 1993, whereupon Generes renoticed and filed the same motion for a new trial for hearing on August 16, 1993. That same day the trial court denied the motion for a new trial. Generes filed a notice of appeal with the Clerk of the Bankruptcy Court in regard to the holdover tenancy matter on August 19, 1993. The Bankruptcy Court ordered the judgment stayed on appeal on August 23, 1993, and approved the Morrell's Supersedeas Bond in the amount of $ 5120.00.

On August 30, 1993, the Morrells cross-appealed the Bankruptcy Court's decision to deny them costs and attorney's fees. The basis of the Morrell's appeal is that the court below abused its discretion inasmuch as it found that Generes had "perjured himself in asserting his claims against the Morrells."

III. Bankruptcy Judge's Opinion

The Bankruptcy Court observed that [**9] the case turned on the credibility of the witnesses:

This case turns on the pure issue of credibility. If I believe Mr. Generes, that the [holdover] notice was delivered, or, to the extent that the notice was not delivered, that he has elected, pursuant to common law, to treat the occupancy by the Morrells as a hold-over situation and treat them as hold-over tenants, then he is indeed

entitled to what he prays for . . . If I believe the Morrells, that there was an oral extension agreement by which Mr. Generes agreed to extend the original six-month term of the lease for an additional two months for the same rental, then Mr. Generes, of course, is not entitled to that additional sum and . . . [the Morrells] are entitled to the return of the security deposit.

The Court ultimately found, based on the testimony of all the witnesses, that there was an agreement between the parties whereby the original period of the lease was extended for two months. The Court also found that Generes never delivered the alleged holdover notice as he claimed in his sworn testimony. The Court stated: "I just don't think that the delivery of the notice was reasonable under the circumstances. Nor, in [**10] fact, do I believe the notice was delivered at all or prepared at all."

DISCUSSION

This Court has jurisdiction over both appeals pursuant to 28 U.S.C. @ 158 because the Bankruptcy Court's order entered on the docket July 15, 1993, was a final judgement under both 28 U.S.C. @ 158 and Rule 8001(a) of the Federal Rules of Bankruptcy Procedure. Under 28 U.S.C. @ 158(a) federal district courts have appellate jurisdiction "from final judgments, orders and decrees" of the bankruptcy courts.

Standard for Review As a preliminary matter, this Court finds that the proceedings before the bankruptcy court were a "core" proceeding under 28 U.S.C. @ 157. A proceeding is "core" if it invokes a substantive right provided by Title 11. See Barnett v. Stern, 909 F.2d 973, 981 (7th Cir. 1990).

A bankruptcy judge's factual findings are entitled to substantial deference in this Court, and will not be set aside unless they are clearly erroneous. Fed. R. Bankr. P. Rule 7052. Rule 7052 of Fed. R. Bankr. P. incorporates by reference [**11] Rule 52 of the Fed. R. Civ. P., which provides in part: "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding is clearly erroneous when "although there is [*1017] evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed.

2d 518, 105 S. Ct. 1504 (1985). Questions of law require a de novo review. Park Terrace Townhouses v. Wilds, 852 F.2d 1019 (7th Cir. 1988). The court must also determine whether the trial court applied the proper legal standard to the facts.

Denial of Generes' Motion for New Trial

Generes claims that the trial court erred in striking his motion for a new trial for failure to comply with Local Rule 12, which requires that the motion include a date of presentment. Local Rule 12(i), provides that:

Denial of Motion for Failure to Prosecute. Where the moving [**12] party, or if the party is represented by counsel, counsel for the moving party, delivers a motion for which no date of presentment is set and fails to serve notice of a date of presentment within ten days of delivering the copy of the motion to the court as provided by section E of this Rule, the Court may on its own initiative deny the motion.

Generes contends that on July 28, 1993, two days after the motion was filed and prior to the ten-day period allowed under Rule 12(i) to notice a date for hearing the motion, the court improperly entered an order striking the motion. However, as the Morrells correctly point out, even though the court's order was dated two days after the motion was filed, the order was not entered on the docket until seventeen days later--on August 12, 1993. Thus, Generes had more than the requisite ten days to comply with Local Rule 12(i) and set a hearing date before the order was finalized, which he declined to do. Even assuming that the court entered its order prematurely, Generes was not deprived of the opportunity to comply with the requirements of Rule 12. We therefore conclude that the trial court did not err in denying Generes' motion for a new trial. [**13] Nor did the trial court err in insisting that the motion for a new trial, when renoticed for a later date, be considered as a Fed. R. Civ. P. Rule 60 motion. Rule 60 appropriately prescribes the procedure for correcting or vacating orders or other parts of the record which contain clerical mistakes. Clearly the trial court acted within its discretion in denying the Generes' Rule 60 motion when, in its own judgment, either no mistake was made or its effect was inconsequential.

Holdover Tenancy v. Tenancy at Sufferance We first address the issue of whether the trial court's finding that the parties had a

valid two-month oral lease was clearly erroneous. Generes claims that the Morrells were holdover tenants bound by the terms of a letter which he allegedly delivered to the Morrells informing them of his election to hold them over for one year. Even in the absence of of a written notice, however, Generes contends that no valid and enforceable oral contract was created to overcome the presumption at law that a holdover tenancy existed. Generes reasons that under the common law the Morrells would thus be obligated to pay rent for an additional six-month term. The Morrells argue that [**14] they were tenants at sufferance based on an alleged oral agreement which modified the original written lease, extending the lease for two additional months. As tenants at sufferance, the Morrells contend that they were entitled to terminate the lease at will and were therefore not obligated to pay rent after vacating the rental property.

The failure of a tenant to vacate the premises following the expiration of a lease term may create a tenancy at sufferance or a holdover tenancy. Bransky v. Schmidt Motor Sales, Inc., 222 Ill. App. 3d 1056, 584 N.E.2d 892, 894, 165 Ill. Dec. 458 (Ill. App. Ct. 1991). A tenant at sufferance is "one [who] comes into possession of property by lawful title, but wrongfully holds over after the termination of his interest." Bransky at 894 (quoting Black's Law Dictionary 1466 (6th ed. 1990)). The right of a tenant at sufferance is limited to possession only, which the landlord may terminate at any time, without notice. Bransky at 894.

Generes correctly asserts that if a lessee holds over after the expiration of the [*1018] term of the lease, only the lessor, not the lessee, has the right to decide [**15] whether to treat the lessee as a holdover tenant. In the absence of evidence to the contrary, a presumption arises that there is a holding over under the terms of the original lease. Bransky at 895 (citing Bellows v. Ziv, 38 Ill. App. 2d 342, 187 N.E.2d 265 (1962). However, in this case, the court below determined that an oral lease was created, overcoming the presumption that a holdover tenancy was created. The rules relating to holdover tenancies do not apply where there is a contrary mutual understanding concerning the tenant's continued occupancy of the premises after expiration of the term of the lease. Cottrell v. Gerson, 296 Ill. App. 412, 16 N.E.2d 529 (Ill. 1939). The burden of establishing such an agreement is on the

tenant, and the presumption applies unless a preponderance of the evidence establishes a contrary agreement. Id. We next determine whether the Morrells sustained their burden of establishing the existence of an oral agreement. Generes argues that no valid and enforceable oral contract was created.

It is well established that the parties to a written contract may [**16] alter or modify its terms by a subsequent oral agreement. South Shore Amusements, Inc. v. Supersport Auto Racing Asso., 136 Ill. App. 3d 284, 483 N.E.2d 337, 340, 91 Ill. Dec. 55 (Ill. App. Ct. 1985). Whether an oral contract exists, its terms and conditions, and the intent of the parties are questions of fact to be determined by the trier-of-fact. South Shore at 340. The question of whether a binding contract exists is determined by the intent of the parties when the document in question is executed. Evans, Inc. v. Tiffany & Co., 416 F. Supp. 224, 238 (N.D. Ill. 1976). In measuring intent, all relevant circumstances surrounding the negotiation and execution of the agreement should be considered, as well as the language and terms of the agreement itself.

The bankruptcy court clearly held that there was a valid and enforceable oral lease. The court found a valid offer, acceptance and consideration; the terms of the agreement were definite, and the surrounding circumstances indicated that the parties intended to be contractually bound. Generes admitted in his testimony that, aside from the [**17] notice which the court determined he fabricated, he never discussed the holdover tenancy with the Morrells.

Even if no definite term was decided upon, the result is the same. An agreement that does not state or contain a definite time for termination is terminable at the will of either party. Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc., 130 Ill. App. 3d 798, 474 N.E.2d 1245, 1249, 86 Ill. Dec. 48 (Ill. App. Ct. 1985). Thus, even assuming that the lease term was indefinite, the Morrells acted within their contractual rights in electing to terminate the oral agreement with Generes at their will.

Generes next argues that under the parol evidence rule "oral testimony to vary the terms of the written holdover lease is excluded from consideration by the court." Generes' application of the parol evidence rule to the facts of this case is misguided. The parol evidence rule bars evidence of prior or contemporaneous

oral agreements which alter the scope or meaning of a written instrument. The only written instrument at issue here is the original written lease. Oral testimony concerning the extension of the lease was not [**18] prior to or contemporaneous with the document's creation, but occurred later, in the Spring of 1991. If Generes refers to the letter which purportedly established a holdover tenancy, the court below found that it had been fabricated.

Prohibition of Closing Argument

Generes next alleges that the trial court abused its discretion in denying him the right to closing argument. The record reflects that the trial judge instructed Generes to sit down and keep quiet immediately prior to making his closing argument.

While the Federal Rules of Civil Procedure and the Federal Rules of Evidence address the order and presentation of closing argument, neither addresses the outright denial of closing argument. It is well-settled that a criminal defendant has a Sixth Amendment right to present a closing argument in a [*1019] bench or jury trial. Herring v. New York, 422 U.S. 853, 45 L. Ed. 2d 593, 95 S. Ct. 2550 (1975). It is less apparent whether a closing argument is required in civil cases.

Recently, the Illinois Court of Appeals noted that closing argument in a civil case is not a right, but a privilege. Korbelik v. Staschke, 232 Ill. App. 3d 114, 596 N.E.2d 805, 173 Ill. Dec. 181 (Ill. App. Ct. 1991). [**19] In Korbelik, the plaintiff in a malicious prosecution action appealed from a judgment in favor of the defendants, claiming that the trial court erred in not allowing plaintiff's counsel to make a closing argument. The judge instructed counsel that closing argument wasn't necessary and indicated that he wished to "save time." Id. at 808. When plaintiff's counsel requested the opportunity to summarize his case, the judge indicated that he was "pretty well aware of the testimony that has been given in this case." Id. at 808.

The appellate court noted that "Illinois follows those jurisdictions which hold that "oral argument in a civil proceeding tried before the court without a jury, is a privilege, not a right, which is accorded to the parties by the court in its discretion." Id. at 808. The appellate court held that the trial court did not abuse its discretion in refusing to permit plaintiff's attorney to make a closing argument. The court noted that the case was tried without a

jury; involved "a very short trial with an uncomplicated factual scenario"; and that the judge took extensive notes of the trial proceedings. Id.

In the instant case, we find no evidence [**20] that Generes was prejudiced by the trial judge's refusal to allow him to present a closing argument. The trial judge expressly stated that the case turned on the credibility of the parties. The trial judge did not find Generes' testimony to be credible, and we fail to discern how Generes could recover his credibility in a closing argument. Furthermore, we agree with the Morrells that Generes effectively made his closing argument in two post-judgment motions before the trial court. We therefore conclude that, even assuming that the trial judge erred in not allowing Generes to present a closing argument, the error was harmless.

Costs

The Morrells seek costs pursuant to Fed. R. Bankr. P. Rule 7054(b), which provides that "the court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides." n2 Seventh Circuit case law recognizes a rebuttable presumption that costs be awarded to the winning party. Popeil Brothers, Inc. v. Schick Electric, Inc., 516 F.2d 772 (7th Cir. 1975)

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n2 Fed. R. Civ. P. Rule 54(d), applicable in other federal litigation, provides: "Except when express provision therefore is made either in statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

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The defendants in Popeil Brothers appealed the district court's denial of costs and attorney's fees pursuant to Rule 54(d) of the Federal Rules of Civil Procedure in a patent infringement action. In analyzing Rule 54(d), the Seventh Circuit discussed the awarding of costs in equity proceedings, noting that, prior to the promulgation of the Federal Rules of Civil Procedure, costs were considered a matter of discretion unless controlled by statute or rule of court. Id. at 774. The Popeil court stated that "the prevailing party is, however, prima facie entitled to costs, and it is incumbent on the unsuccessful party to show circumstances sufficient to

overcome the presumption." Id. at 774 (quoting In re Northern Indiana Oil Co., 192 F.2d 139, 142 (7th Cir. 1951)). "This principle must be . . . applied, unless the losing party can show that equity and good conscience require a different judgment." Id. at 774 (quoting Hodgman v. Atlantic Refining Co., 20 F.2d 949, 951 (D. Del. 1927)). The Seventh Circuit therefore interprets Rule 7054 to mean that a presumption [**22] is created that the prevailing party is entitled to costs, which the losing party must overcome.

Thus, under Popeil, Generes must prove "circumstances sufficient to overcome the presumption" that costs be awarded to the Morrells as the prevailing party. The [*1020] Morrells point to Generes' bad faith in conducting himself throughout the litigation, both as a party to the proceedings and as an attorney, in support of their request for costs. The Morrells allege that Generes has engaged in "punitive litigation tactics" which have resulted in their suffering "a financial bloodbath at the hands of Generes and his meritless claims.'" First, the Morrells point out that the trial court ultimately determined that Generes, "an attorney and officer of the court," lied about the creation and delivery of a holdover tenancy and fabricated the letter which he attached to his brief in support of that holdover tenancy. n3 Second, the Morrells claim that they were forced to hire legal counsel and incur prohibitive legal fees in order to defend themselves against Generes' meritless claims with respect to the holdover and property damages. The Morrell's assert that the claim for over $ 8000 in property [**23] damages during an eight-month lease was so groundless that Generes dismissed it on his own motion just two weeks before the trial. Third, in the Morrell's view, Generes has taken advantage of his status as an attorney in representing himself pro se by prolonging the litigation at their expense without incurring any legal debts. Lastly, the Morrells charge that Generes has disingenuously attempted to establish in his briefs that the Morrells committed arson and insurance fraud.

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n3 The trial court expressly stated: "I just don't think that the delivery of the notice was reasonable under the circumstances.

Nor, in fact, do I believe the notice was delivered at all or prepared at all."

----------End Footnotes----------

Generes failed to overcome the presumption that the Morrells, as prevailing parties, are entitled to costs. We therefore hold that the trial court abused its discretion in failing to award costs to the Morrells.

Attorney's Fees

The Morrells next contend that the trial court abused its discretion in failing to award them attorney's fees. [**24] a) Court's Inherent Powers

The Morrells request attorney's fees pursuant to this court's general equitable powers, claiming that they should be awarded attorney's fees based on the "bad faith" exception to the American Rule. The Morrells contend that the same factors which compel the award of costs demand the assessment of attorney's fees against Generes.

There is no provision in the Bankruptcy Act or Rules which expressly authorizes an award of attorney's fees based on the facts of the present case. Although early decisions consistently denied the grant of such awards, it is now well-settled that a bankruptcy court may assess counsel fees against a party which has acted contemptuously or in bad faith. See Hammett v. Hammett, 28 Bankr. 1012, 1015 (E. D. Penn. 1983). Under a principle known as the American Rule, each party to a lawsuit ordinarily bears its own attorney's fees unless a statute or decisional authority provides otherwise. See Alyeska Pipeline and Service Co. v. Wilderness Society, 421 U.S. 240, 247, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975); Hall v. Cole, 412 U.S. 1, 5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973). [**25] One of the exceptions to the American Rule authorizes a federal court to award counsel fees to a successful party "when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Hall at 5. The authority for this exception rests upon the general equity powers of the federal courts. Id.

The Supreme Court in Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), recently reaffirmed a district court's inherent power to assess attorney's fees as sanctions for bad-faith conduct in litigation. The Court reasoned that the

power to assess sanctions for bad-faith litigation was one of the inherent or implied powers which courts must necessarily possess "to manage their affairs and govern their affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 2132. The power to assess attorney's fees, like other inherent powers possessed by the district court, is based on the need to control court proceedings and the necessity of protecting the exercise of judicial authority in [*1021] connection with those proceedings. Id. These principles are equally [**26] applicable to the bankruptcy court, since a bankruptcy proceeding is an equitable proceeding. See Bank of Marin v. England, 385 U.S. 99, 103, 17 L. Ed. 2d 197, 87 S. Ct. 274 (1966).

The Chambers Court expressly stated that the inherent power of a court can be invoked even if other procedural rules exist to sanction the same conduct:

> There is nothing in [28 U.S.C. @ 1927], Rule 11, or other Federal Rules of Civil Procedure authorizing attorney's fees as a sanction, or in this Court's decisions interpreting those other sanctioning mechanisms, that warrants a conclusion that, taken alone or together, the other mechanisms displace courts' inherent power to impose attorney's fees as a sanction for bad-faith conduct. Although a court ordinarily should rely on such rules when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to task.

Id. at 2126.

Since the Court expressed a preference for sanctioning [**27] conduct under rules and statutes, we ordinarily consider any such authority before considering the court's inherent power to award attorney's fees. However, in cases where a statute or rule may not be "up to task" in addressing the full range of conduct at issue, a court may rely on its inherent power to sanction that conduct. Id. The Chambers Court recognized that sanctioning statutes and rules may reach "only certain individuals or conduct," whereas "the inherent power extends to a full range of litigation abuses." Id. The Court concluded that, "at the very least, the inherent power must continue to exist to fill in the interstices." Id. at 2134. Therefore, where rules and statutes fail to "fill in the interstices" of the full

range of a party's conduct, a court may invoke its inherent powers to do so:

In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which [**28] is contrary to the aim of the rules themselves.

Id. at 2136.

Therefore, in the instant case, even if we can demonstrate that Generes' conduct is sanctionable under other applicable statutes or rules, we may invoke our inherent power if the full range of his bad-faith conduct is beyond the reach of such authority. For example, in Chambers the defendant's conduct relating to the filing of frivolous and false pleadings was sanctionable under Rule 11, which governs papers filed with a court. Id. However, the Court noted that the defendant also "attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance," and such acts could not be reached by Rule 11. Id.

Similarly, the Court determined that 28 U.S.C. @ 1927 is not broad enough to reach "acts which degrade the judicial system," including "attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court." Id. at 2130. Here, notwithstanding whether Generes has violated Rule 11 for filing "false and frivolous pleadings," since much of his alleged bad-faith conduct is beyond the reach of the [**29] rules, we are justified in relying on our inherent power to sanction him if warranted.

In the instant case the record reflects that Generes' conduct rivals that of the defendant in Chambers, who not only filed false and frivolous pleadings, but committed perjury and harassed his opponents. Furthermore, Generes used these proceedings as a vehicle for making serious and scandalous allegations which are totally bereft of any basis in fact or law, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith. Generes also improperly disclosed the contents of settlement negotiations and accused the trial judge of improper ex [*1022] parte communications with

opposing counsel without any sustantiation whatsoever. Moreover, the briefs which Generes submitted to this court are poorly organized, replete with typographical and grammatical errors, and sorely lacking in relevant legal authority. The fact that Generes is representing himself pro se in this matter and is not a member of the federal trial bar does not alter our decision. Generes has practiced law for nearly twenty years and is not a stranger to the law or to the legal system. [**30] While we regard an award of fees against an opposing party to be a severe measure which this Court reserves for exceptional circumstance, we believe such a sanction is warranted here.

Although we have determined that the the full range of Generes' conduct is beyond the reach of Rule 11, for the sake of argument we will consider all applicable statutes and rules in addition to invoking this court's inherent power to award attorney's fees. We first note that the fact that the Morrells did not request attorney's fees under any statute or rule does not preclude this court from exercising its judgment sua sponte that Generes violated a given statute or rule, including Rule 11. Accordingly, under the facts of this case we deem it appropriate to consider awarding attorney's fees pursuant to Rule 11 of the Fed. R. Civ. P. (or its equivalent, Fed. R. Bank P. Rule 9011), and 28 U.S.C. sec. 1927.

b) Sanctions under Rule 11/Bankruptcy Rule 9011 Attorney's fees are expressly authorized by Bankruptcy Rule 9011, which tracks the language of Federal Rule of Civil Procedure 11. Bankruptcy Rule 9011, like Fed. R. Civ. P. 11, permits the district court to award [**31] sanctions for attorneys who file documents that are not "well grounded in fact . . . [or] warranted by existing law. . . ." Rule 9011 provides:

The signature of an attorney or a party constitutes a certificate that [the signer] has read the document; that to the best of [the signer's] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation . . . If a document is signed in violation of this rule, the court on motion or its own initiative, shall shall impose on the person who signed it, the represented party, or both, an appropriate

sanction, which may include an order to pay . . . the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.
Rule 9011(a).

Under Rule 11, attorneys are required to make a reasonable inquiry to determine whether pleadings or other documents they sign are well-grounded in fact and warranted by existing [**32] law. If the district court concludes that the motion, pleading, or other document was not well-grounded in fact or warranted by the existing law, or was meant to harass, then the court must impose a sanction. Fed. R. Civ. P. 11; Insurance Benefit Administrators, Inc. v. Martin, 871 F.2d 1354, 1357 (7th Cir. 1989). We note, however, that Rule 11 does not require a finding of bad faith. Chambers at 2134; National Wrecking Co. v. International Bhd. of Teamsters, Local 731, 990 F.2d 957, 963 (7th Cir. 1993). The standard for imposing sanctions under Rule 11 is an objective determination of whether a party's actions were reasonable under the circumstances. Brown v. Federation of State Med. Bds., 830 F.2d 1429, 1435 (7th Cir. 1987).

There are two grounds for sanctions in Rule 11: the "frivolousness clause" and the "improper purpose clause." Brown at 1435. The frivolousness clause of Rule 11 has two subparts: whether the party or attorney made a reasonable inquiry into the facts, and whether the party or attorney made a reasonable inquiry into the law. Id. A violation of either subpart [**33] of the frivolousness clause constitutes a violation of Rule 11. Id.

To determine whether an attorney has made a reasonable inquiry into the facts of a case, we must consider: 1) whether the signer of the documents had sufficient [*1023] time for investigation; (2) the extent to which the attorney had to rely on his client for the factual foundation underlying the pleading, motion, or other paper; (3) whether the case was accepted from another attorney; (4) the complexity of the facts and the attorney's ability to do a sufficient prefiling investigation; and (5) whether discovery would have been beneficial to the development of the underlying facts. Brown at 1435. To determine whether the attorney in question made a reasonable inquiry into the law, the district court should consider: (1) the amount of time the attorney had to prepare the document and research the relevant law; (2) whether the document contained

a plausible view of the law; (3) the complexity of the legal questions involved; and (4) whether the document was a good faith effort to extend or modify the law. Id.

We first find that Generes has not made a reasonable inquiry into the facts. Many of the allegations made [**34] by Generes in his briefs, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith, are so plainly contentious and irrelevant that they do not lend themselves to a meaningful investigation into the facts. For instance, Generes devoted considerable time perfecting his argument that the Morrells burned down their own home: "in light of [the Morrell's testimony, I have [since] concluded that the Morrells deliberately set their home on fire in order to have their insurance pay for what they wanted, but could not afford, themselves."

We agree with the Morrells that "Generes fills his 33 pages with equal parts irrelevance, innuendo, conjecture and other unsupported legal and factual assertions." In numerous instances Generes resorts to accusations and name-calling. In response to Mr. Morrell's trial testimony, Generes comments that "YOU CAN JUST SEE HIS NOSE GROWING as he tell [sic] this big one to the court," and later claims that "the alleged oral lease is a totally preposterous lie!" Moreover, Generes presented thirteen issues in his appellate brief which were presented in an unorganized and incomprehensible fashion. [**35]

We further conclude that Generes has not made a reasonable inquiry into the law, which is undoubtedly a consequence of his reliance on unsupported facts to begin with. Generes' briefs contain numerous arguments which are either unsupported or improperly supported by case law outside the Seventh Circuit when case law exists within this circuit.

The other prong of Rule 11, the "improper purpose clause," provides that a motion, pleading, or other document may not be interposed for purposes of delay, harassment, or increasing the costs of litigation. Brown at 1435. However, since we have found that Generes violated the frivolousness prong of Rule 11, it is unnecessary to address whether Generes violated the "improper purpose clause." Similarly, we decline to consider whether attorney's fees may also be awarded under 28 U.S.C. @ 1927, which

provides that "any attorney . . . who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs incurred because of such conduct." Accordingly, we exercise our discretion in finding that that Generes violated Fed. R. Civ. P. 11 and [**36] Bank. R. 9011 by filing a frivolous brief. Alternatively, we rely on our inherent power to impose attorney's fees for Generes' bad faith conduct.

CONCLUSION

For the foregoing reasons, we reverse that part of the Bankruptcy Court's judgment that denied attorney's fees and costs to the defendants, and remand the case to the Bankruptcy Court to determine and impose attorney's fees and costs pursuant to Bankruptcy Rule 7054(b).

ENTER:

GEORGE M. MAROVICH

UNITED STATES DISTRICT JUDGE

DATED: March 10, 1994

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: TASKER GENERES | ) | 91 B-177220 |
| and DOROTHY GENERES, | ) | Chapter 11 |
| Joint Debtors. | ) | |
| | ) | |
| TASKER GENERES | ) | Adv. No. 92A01283 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| | ) | |
| EDWARD L. MORRELL and | ) | |
| PATRICIA MORRELL, | ) | |
| | ) | |
| Defendants, | ) | |

**MINUTE ORDER (EOD AUG 19, 1993)**

For the reasons stated in open court plaintiffs, motion for a new trial is denied.

David H. Coar
U.S. Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: TASKER GENERES and DOROTHY GENERES, Joint Debtors. | ) | 91 B-177220 Chapter 11 |
| TASKER GENERES Plaintiff, | ) | Adv. No. 92A01283 |
| EDWARD L. MORRELL and PATRICIA MORRELL, Defendants, | ) | |

**ORDER**

IT IS HERBY ORDERED THAT The Plaintiff's (Pro se) Motion for a New Trial is Stricken for the Plaintiff's failure to Notice this Motion for a date certain pursuant to Local Rule 12.

Dated: July 28, 1993 ENTER

David H. Coar
U.S. Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: TASKER GENERES and DOROTHY GENERES, | ) | 91 B-177220 Chapter 11 |
| Joint Debtors. | ) | |
| TASKER GENERES | ) | Adv. No. 92A01283 |
| Plaintiff, | ) | |
| EDWARD L. MORRELL and PATRICIA MORRELL, Defendants, | ) | |

**MOTION FOR A NEW TRIAL**

Plaintiff, TASKER GENERES, pro se moves, pursuant to Bankruptcy Rule 9023 and, by reference, Rule 59 of the Federal Rules of Civil Procedure for a new trial and to set aside the judgment in the above captioned case and additional time in which to file a legal memorandum, and in support of this motion states as follows:

1. On June 30, 1993, the above captioned matter went to trial.

2. On July 15, 1993, the Final Order of this Court was entered on the Docket which denied Plaintiff's objection to the claim filed by the defendants Edward and Patricia Morrell and denied Plaintiff's counterclaim.

3. The trial court erred in denying to plaintiff's counsel the right to make a closing argument. Under Illinois Law the right of counsel for all parties to make a closing argument is absolute, Vieceli v Cummings, 322 Ill.App. 559, 561, 54 N.E.2d 717(Ill App. 1st Dist, 1944). Further, at 561 the Viesceli court held: "The law is well settled that argument of counsel is a matter of right. Argument of a case is as much a part of the trial as the hearing of the evidence. A party to a civil suit has a right to be heard, either by himself or by counsel, not only in testimony, but in the argument of his case." In the case at bar, Plaintiff's counsel at the appropriate time rose and announced he would commence his closing argument. Then, because the trial court ordered plaintiff's counsel to sit down and not make his closing argument, the court committed error of constitutional proportions. Thus, the Court denied plaintiff's constitutional right of due process of law and to a fair trial under the Constitution of the State of Illinois, Article I, Section 2 and the United States Constitution Fifth and Fourteenth Amendments.

4. Alternatively, if the right to be heard in argument in a civil case is not an element of a "fair trial" inherent in American jurisprudence, then it is an abuse of discretion for the Trial Court to order plaintiff's counsel to sit down and not make his closing argument. Reasonable discretion does not comprehend deprivation of a party's right to present analysis of evidence and inferences claimed to be deductible therefrom to the trier of fact. Where the court is making a decision on the basis of contested versions of the facts heard in evidence and inferences made therefrom, it is clear from the Vieceli case that what is known in Illinois as a trial was ordered prematurely terminated before a complete trial was had. While the Trial Court clearly has the discretion to limited the argument of counsel, that discretion is abused when the Court employs a sort of differential calculus by taking the limit of argument time to zero. Such an extreme is obviously prejudicial not only to the parties but to the ordered system of justice. See Thompson v People of State of Illinois 144 Ill 378, 381, 32 N.E. 968 (Ill.S.Ct., 1893)

5. A new trial should be granted because the judgment was contrary to the evidence and internally inconsistent.

a.) The Trial Court correctly concluded that Plaintiff had a written lease with the defendants for the period 12/18/90 to 6/17/91 at a monthly rental rate of $2,200 and a security deposit of $4,400.

b) The Trial Court correctly concluded that as a matter of common law since the tenants remained in possession after the stated term of the lease had expired and no forcible detainer action was filed and the tenant tendered and the landlord accepted further rent that a hold over tenancy had been created.

c).It is entirely the landlord's decision whether there will be a holdover tenancy or an eviction. The tenant has no voice in the matter at all. Such a hold over tenancy is governed by the same written terms as the written lease under which the tenants entered the premises. The holding over does not renew or extend the lease but it creates a new tenancy from year to year. Bransky v Schmidt Motor Sales, Inc., 222 Ill. App.3d 1056, 1061(2nd Dist, 1991) The original written Morrell lease provided that a holdover tenancy would be for a term of one year. Furthermore, the standard of evidence necessary to support a finding of an alleged oral lease is by clear and convincing proof to overcome a holdover lease. It is not the ordinary burden of more likely than not.

d) Thus, the issue became whether the court had clear and convincing evidence that a new oral lease for a term of exactly two more months had instead been agreed to by the parties in derogation of the written holdover tenancy. As a matter of substantive law, oral testimony to vary the terms of the written holdover lease is excluded from consideration by the court by virtue of the parol evidence rule. The parol evidence rule is a matter of substantive contract law and cannot be waived. The parol evidence rule bars evidence of a prior or contemporaneous collateral agreement where the effect is to alter the scope and meaning of the written instrument. In other words, parol evidence is not admissible to establish a collateral agreement which varies, contradicts, or annuls the terms of an unambiguous written contract which is complete on its face. 20 Am Jur 2d, Evidence Section 1049. Hence parol evidence of an oral agreement prior to 6/18/91 to

show that the written hold over lease never was formed on 6/18/91 or that an oral lease for two months commenced on 6/18/91 is inadmissible evidence upon which the court based its judgment. However, the Morrell's testimony alleged the agreement for a new oral lease of two months duration occurred prior to 6/18/91. Hence the court erred in ruling in favor of Morrell's alleged oral lease.

6 A new trial should be granted because the judgment was contrary to the evidence and internally inconsistent.

a) According to the testimony at trial, the Morrells had the written lease reviewed by their attorney. The Morrells knew how to and insisted on having the written lease modified to specifically protect their right to have a dog on the premises and other non standard terms.

b) The Morrells wanted and received a written six month lease. They did not get, as the Court mistakenly concluded, a lease for "however long it took the Morrells to finish their house". This concept is absurd and defies the purpose of a six month written lease. The Court should not write a lease for the parties to which they never agreed. Morrells attorney in his opening statement stated that the lease was for as long as the Morrells wanted, but their was no evidence presented at trial for that term of lease.

c) Morrells' six (6) month lease at $2200 a month was $400 per month higher than the previous tenant's one year term monthly rental rate of $1800, or a 25% increase. Morrells' testified that they thought I should rent the house out for an extra two months at a even lower rate than my six month rate. Morrells paid no consideration as the prior tenants were required by Generes for an extra month's stay of $1800 dollars in addition to the regular months rent of $1800. In other word, the Ritoff's who were the prior tenants, paid in effect double rent to stay an extra month. Yet the Morrells would have the court believe that Generes wanted to make a gift to Morrells insurance carrier by charging no consideration to obtain an alleged new lease of only two months duration, when Generes would not make such a gift to his prior tenants who

did not have an insurance company reimbursing them for their expenses.

d) It defies economic sense. Generes were not described as friends or family of Morrells. Morrells testified that they believed Generes stiffed they for about a hundred dollars on a garage door repair just months before the alleged oral lease which Morrell now want the court to them as seeing Generes as someone they were so completely confident and trusting to do the right thing that it was very understandable for the Morrells not to put a new two month lease in writing which implausibly contained absolutely nothing extra for the shorter lease term and left Generes in a disadvantaged seasonal time at which to put the house on the market again. They certainly put the matter of the garage door in writing. It is conceivable that Generes would rent at $2200 a month if the Morrells were responsible for a years term. It in inconceivable otherwise. As experience landlords, themselves, Morrells realized that without some written evidence of a two month lease from June 18, 1991 to August 17, 1991, they would be hold over tenants, liable for a years rent. After all they stayed in possession of the premises without any written evidence to the contrary. They testified they had no evidence at all except their oral testimony that there was a oral lease. The oral lease is totally a preposterous and clearly disingenuous lie.

e) Morrells expect the Court to believe that Generes wanted to make that kind of gift to their insurance company who would have to reimburse them for this fire loss. The 7th Circuit School of Law and Economics would never buy that brand of law which presumes gifts to insurance companies. If this is the way the law works then soon banks will be out of business and commerce will come to an end. All a note holder would have to say is that we reached an oral agreement after we signed the note to extend the due date for five years or what ever time is convenient to the debtor. There will be no reason for written leases, notes, or contracts. Insurance companies will find their policies expanded to cover everything by people saying my wife called and they said OK and I called and they confirmed and "by the way we didn't have to pay any extra premium for the expanded coverage!" People may think that a

lawyer should be eaten by a dinosaur. People may not like landlords. Emotions should not let written contracts between experienced mature adults be turned into gifts from the disliked party to the favored party.

f) According to the testimony of the Morrell's, they own a summer home in Wisconsin which they regularly rent out. The Morrell's exactly schedule the date of their vacation time in their Wisconsin residence by the terms of their rental agreement with their tenants. Being experienced landlords, Morrell's knew full well how to protect themselves by putting lease agreements in writing. Morrells' testified that they feared Generes might not let them stay and that it was of vital importance in their lives. They knew Generes could see that their house was still uninhabitable. They knew that they had misjudged the amount of time it would take to repair their house. This left Morrells is an economic disadvantages position. Yet they want the court to believe Generes decided to make a gift to their insurance company.

g) This knowledge and their practice of using Mr. Morrell's employer's Autotype Inc's computer word processing equipment and company worktime to draw up letters to Generes regarding such a matter as a hundred dollar garage door roller repair impeaches their testimony. No one would believe that Morrells who were experience landlords and very knowledgeable of how to deal with hold overs at their Wisconsin summer home would not put a new two month lease in writing. Particularly one which was so favorable and advantageous as to be incredible that any one would believe it.

h) Further Mr. Morrell's legal writing abilities are well developed as exemplified by his pro se written objection to the Confirmation of Generes's first Plan of reorganization show. At trial Morrell's attorney testified that he did not prepare that writing for his client. Morrell's demonstrated also in the Objection filed, an ability to understand and employee Bankruptcy law in written argument. This legal sophisticate should be the last person in the world to have his attorney point an accusatory finger at Generes and charge

"fraud and extortion". Usually the one who yells that out is actually the guilty party.

i) Mr. Morrell stated in his Objection to Confirmation that he was unaware of the holdover claim against him. It was Mr. Morrell's testimony that he was unaware of the holdover claim until approximately September 21, 1992 when the Plaintiff filed the above caption adversary complaint. These statements were clearly false. Mr. Morrell admits that he received the Debtors' Bankruptcy Schedules which expressly listed the Morrell as a holdover lease. Those schedules were filed and served on September 6, 1991, a whole year before. In addition, Morrells failed to explain why they did not conduct an examination of the debtor as was their right to fully explore the nature of the objection to their claim under oath or if the Morrell's felt confused or uninformed of the nature of Generes Bankruptcy Schedules and their consequences for Morrell. Thus, the Court can only reasonably conclude that Morrells were clearly informed all along about the hold over tenancy.

j) In addition the Morrells noted the For Rent sign on the premises and could see that it continued to be unrented. They have failed to explain why given that Generes had notified them in several different ways of their hold over that they did not attempt to help rent the property themselves or settle this matter earlier other than the realization that their fire insurance carrier would have to reimburse them if they lost.

k) In addition, Morrells filing of their false objection to confirmation of my first plan of reorganization, when they knew I had debts due and payable which I was unable to pay of approximately $500,000, shows an intent to take unfair advantage of my vulnerable situation with intent to force Generes to give up on the Morrell matter in order to get the Generes plan of reorganization confirmed.

6. The judgment is against the manifest weight of the evidence.

a.) Generes testified that all his lease arrangement from the time that 1829 Happ had been rented had all been in writing. Generes employed only written agreements to protect himself.

b) In particular, he testified, that whenever the tenant had requested to stay on beyond the term of the lease, Generes had prepared a written letter covering the new period of occupancy. In particular, Generes, supplied the Court and opposing counsel with the attached Letter used in the case of Generes's prior tenant, Harris and Paula Rittoff, who were building a house across the street from 1829 Happ. On August 28, the letter granted another month of occupancy to September 30, 1990 at $1800 for the month. It was signed. In consideration for the grant of another month of occupancy, Ritoff's paid $1800 in addition to the $1800 rent. A true and correct copy is attached hereto as Exhibit "A".

c) Generes testified that he could tell the Morrell's place which was nearby was nowhere near ready for occupancy by the end of the Morrell lease term so that he did not advertise the place. Morrell's contractor also testified to the fact that the house was not ready for the Morrell's to move out on June 17, 1991. This family of six plus two full mother's- helpers patently could not reasonable move out to her parent's place for another term of at least several more months.

d) Morrell's knew that because they had misjudged the term of lease needed to complete their home that now they were at Generes' mercy as far as the cost and terms of further occupancy. The emotional as well as fiscal cost of moving to another temporary quarters would be substantial, the movers, a new rental furniture contract, getting dogs, kids, and maids adjusted to a new place and routine and possible a different village's children's programs, etc. clearly put Morrells in a position where any further occupancy would be only granted upon costly terms. A suite of hotel rooms would probably cost $600 dollars a night for them. No relative would want that crowd for several months let alone a week and what would be done with their long term household employees.

e) Mrs. Morrell testified that Dorothy Generes, the wife of Tasker Generes, had months before the end of the lease told Mrs. Morrell that the Generes's had had an enormous judgment entered against them in end of December 1990 that left us in perilous financial condition forcing us to consider filing bankruptcy. Under these circumstances, Morrell formed the conclusion that their best strategy was to hold over their occupancy and accept the risk that the house could be sublet when necessary.

f) Generes had told Morrells he didn't mind the six month term of the lease when they asked for it because it would allow the property to be rented during the prime rental market for such large houses. Most families need to be established well before school starts and absent a disaster, such as Morrell's fire, do not want to move except in the summer. Generes had just experienced with his prior tenant a gap in rental between the end of the Ritoff lease and the Morrells December occupancy due to the off season rental caused by Ritoff's extra time.

g) Morrell's realized that an August 17, 1991 termination date would put Generes in the position where it would be impossible for a family to rent and settle in for the school season. It takes time to repair, paint, and make a house ready for a new occupancy.

h) Morrell's either inferred from conversation with the former tenant Ritoff who lived across the street or bet correctly that I would not enforce a doubling of the rent but would accept the same rent when tendered on a hold over one year lease basis. Morrell figured I would be satisfied as long as I did not bear the risk of letting the place out at an in auspicious time in the rental market.

i) All the testimony was that Generes did not advertise the house until the Morrell removed at which time Generes put up a FOR RENT sign in the front yard and advertised in the newspaper. Had Morrell's given notice that they were moving as soon as August 17, 1991, Generes surely would have started advertising at least sixty days before their departure.

j) Furthermore it is remarkable that the rent for the month commencing 6/18/91 was not paid until 7/4/91 after GENERES gave the holdover notice dated 7/1/91 to Morrells. Had there been an oral lease as Morrells allege, the rent certainly would have been paid on or about 6/18/91, as in all the previous months Morrells paid the rent nearly on time. Morrells' concerns, confusion, doubts brought on by their hold over strategy led them to not pay the 6/18/91 rent until they had seen the holdover notice of July 1, 1991 that the rent remained the same, then they paid no doubt with a great sigh of relief. Clearly the $100 late payment fee was due and payable for this late payment.

See Morrells deposition page 9 and 10 attached hereto a exhibit "B" and imagine Generes saying "That is not problem, you can stay as long as you like. Two months is fine. Wonderful! This testimony is incredibly unbelievable self serving testimony that defies economic common sense for both parties. Repeating it at trial does not make it any more credible.

k) The Morrells would have the court believe that when it came time to ask for an additional two months occupancy that Morrells trusted Generes completely and considered him like a saint. Yet Morrells testified that they had just accused Generes prior to the alleged new oral lease to be a nasty overreaching guy mistreating them and stiffing them on a garage repair which drove them to write a nasty letter to Generes. Generes testified that they and their four little kids caused extensive damage of $8000 and they said zero damage, but nevertheless Morrell testimony noted there were repair that Generes had to make due to the trike racing into the drywall, etc.

It is against the manifest weight of the evidence that there was any oral lease which was described by Morrells counsel in his opening statement as a term for however long Morrells needed to finish their house remodeling. Nor a lease for only two months as the Morrells would have the court believe. The inconsistency between counsel and clients is amazing. The Court was wrong to conclude that any version of the facts made any sense given the inconsistencies in the story related above. The Court's conclusion that the

Lease was for the length of time needed to repair Morrells house is not supported by the evidence. Based on this conflicting testimony any alleged oral agreement is unenforceable because of its indefiniteness and lack of consideration. See Demos v National Bank of Greece (First Dist, 1991), 209 Ill. App.3d 655, 661.

7.Morrells' attorney introduced error by his misconduct and ad hominem arguments.

a) Morrells' attorney told the Court in his opening argument that the burden of proof was upon the Plaintiff, that Plaintiff could not meet that burden, and that Defendant had no burden of proof. This is error Defendant clearly had the burden of proof that an oral lease had been formed. It is an affirmative defense which was not properly plead. However, that does not excuse, Morrells burden of proof.

b) Likewise, Defendant's attorney advised the court in opening that "Generes never discussed the hold over tenancy with Morrell and Morrell never acknowledged its existence" was false as both Generes's deposition showed and Generes's trial testimony showed and Generes's bankruptcy schedule filing showed. Because no closing argument was permitted, Generes's attorney was not able to bring these facts to the court's attention as he intended to do.

c) If the Defendant's defense is that Generes has committed a fraud by falsely stating that no oral lease occurred as seems to be Defendant's attorney's accusation. He has failed to properly plead it as an affirmative defense and further has not produced sufficient evidence to overcome the presumption that all men are honest, and that, therefore, where fraud is charged, it must affirmatively be proved by clear and convincing testimony, Jaworski v Sujewics (1929), 334 Ill 19, 165 NE 147.

Clearly by the exercise of ordinary prudence, Morrell, had ample opportunity to evidence an alleged oral lease by some timely writing documentation as was his habit with even minor matters. However as both Mr. and Mrs. Morrell testified they did not have any writing documentation at all, not even a note to his

secretary, or an entry in his work log. There was no supporting testimony whatsoever by anyone else.

From Morrells testimony, they felt the need for at least each other to independently confirm the "alleged" oral lease on the telephone. It is strange for a spouse who believes that a matter needs confirmation to utilize such an "unbiased and independent" witness as their own spouse as a method of confirmation of a vital contract with self recognized importance to their financial well being by both of them. Particularly for mature adults experienced in business matters and leasing who testified that they used their attorney to review the written lease for the very premises that now they did not need to even phone that attorney to at least advise about the prudence of an oral agreement at this recognized vital juncture and who could also serve as a witness of its discussion by them at least. This is a preposterous flaw in their evidence destructive of their case..

Even the contractor who appeared did not testify that he had a conversation with Mr. or Mrs. Morrell where Morrell told him that Generes had granted Morrell a extra two months to get the house done. If that were the fact, it seems strange that the contractor was not asked to testify to it.

People would be justified in concluding that neither Mrs. nor Mr. Morrell ever told their contractor remodeling their house that they had a confirmed lease agreement for an additional two months so please get the house done in time. A failure to communicate such an important fact to the contractor is inconceivable unless there was no such fact. Morrells therefore have been impeached by their own witness. His silence on such a key point shows their fraud on the court in a glaring light.

The contractor's testimony and his failure to testify as expected if there was an additional two months lease agreement is devastating to the Morrells' case. Had Generes's attorney had an opportunity to make a closing argument this set of facts would have been brought explicitly to the attention of the trier of fact.

The Court should ask what was the purpose of this witness? This was to be the big gun to blow Generes's case away with "independent" testimony confirming the existence of an oral lease. Generes was suppose to believe this guy was in their pocket and be intimidated into accepting their settlement offer of $4400 before trial. Generes called their bluff. Probably that's why their attorney took to the tack of asking mind numbing repetitious questions and wondering all of the course, and way outside of the relevant, changing his order of witnesses, etc. and lunching an ad hominem attack. It should have been obvious that their canon instead of blowing Generes out of the water, did not just backfire, but turned around an unloaded into the Morrells and most embarrassingly into their attorney, exposing all. The contractor's testimony on the existence of the oral lease was never asked for and wasn't given because the witness wasn't apparently in their pocket after all. Bad bluff, but, insurance carrier's attorney's win enough of them.

Sadly counsel for Generes was not able to highlight this for the trier of fact because the court refused to hear Mr. Sandack due to the tiresome longwinded mind-numbing tactics of opposing counsel who forced the proceeding past the time the train would leave if argument were allowed.

8. Defendant's pleadings admit the essential allegation of the plaintiff's case and fail to plead any affirmative defense. No affirmative defense is separately set forth and so denominated in the answer filed to Plaintiff's complaint. In particular, no affirmative defense of an oral lease has been properly pleaded.

a) Rule 9(c) of the Rules of Civil Procedure for the United States District Courts provides:
"In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

b) Paragraph 23 of Count II of the Generes Complaint alleges that Generes has fulfilled all of his obligations under the Lease.

Morrell answered paragraph 23 with only a denial. This operates under Rule 9(c) as a judicial admission by Morrell that Generes fulfilled all of his obligation under the Lease.

c) Furthermore, the denial by Morrell of paragraph 12 of the complaint which states: "Generes had no right to double rent during the holdover because the Morrells did not agree to such a rental rate when the parties orally extended the lease on a month-to-month basis." By implication does not deny that the holdover lease was for a period of one year on a month to month basis for the payment of rent. It is a negative pregnant pleading. This operates as a judicial admission of a holdover lease for the period of one year. This impeaches and should bar any attempt to show a shorter term of lease.

d) In paragraph 24, Morrell denied that any of their lease payments were late. Nevertheless during discovery, their check for the payment for the period beginning June 18, 1991 was plainly and admittedly paid late on July 4, 1991. Thus, the pleading contain a blatant falsehood. Nothing should be believed of what they testify. Thus, the Morrells owe a late fee and the Court was in error not to award a late fee.

Wherefore, Generes prays that the Court set aside the judgment and grant the motion for a new trial.

_____

Tasker O. de Generes

EXHIBIT "A"

Tasker O Generes
1845 Happ Road
Northbrook, Il 60062-5643
(708) 564-8944

Paula and Harris Rittoff
1829 Happ Road
Northbrook, IL 60062-5643

Dear Paula and Harris:

You requested an extension of the term of your present lease. Please sign and return one copy of this lease rider to the lease for 1829 Happ Road to me.

This lease rider incorporates by reference each and every provision of the original lease between the undersigned parties for the residence located at 1829 Happ Road, Northbrook, Illinois

Whereas, Lessee desires to continue occupancy to September 30, 1990. The parties by their signatures hereto express their agreement to the following modification of the original lease.

1. The term of the lease is extended to September 30, 1990.
2. Lessee shall pay $1800 per month.
3. Lessee shall pay an additional $1800 renewal fee which will be taken from the security deposit at once reducing the security deposit to zero.

Dated 8/23/90
Signed (Harris R. Rittoff) , (Tasker O. Generes).

Supreme Court, U.S.
FILED

95 2 0 4 9 JUN 1 8 1996

OFFICE OF THE CLERK

No.__

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

---

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

---

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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# APPENDIX "B"
# TO
# PETITION FOR WRIT OF CERTIORARI

I. BANKRUPTCY COURT ORDER FOR ADVERSARY 92 A 01283
II. TRIAL TRANSCRIPT FOR ADVERSARY 92 A 01283
INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

---

Tasker O de Generes
Counsel of Record
Counsel for Petitioner
1845 Happ Road
Northbrook, IL 60062-5643
(847) 564-8944
June 19, 1996

69pp

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**EOD JUL 15 1993**

| | | |
|---|---|---|
| IN RE: | ) | |
| TASKER GENERES and DOROTHY | ) | 91 B-17220 |
| GENERES, | ) | |
| Joint Debtors, | ) | Chapter 1 1 |
| TASKER GENERES | ) | Judge Coar |
| Plaintiff, | ) | Adv. No. 92 A |
| | ) | 01283 |
| | ) | |
| EDWARD L. MORRELL | ) | |
| and PATRICIA MORRELL, | ) | |
| Defendants. | ) | |

**FINAL ORDER**

This cause having been heard in an adversary proceeding on June 30, 1993, the Court being fully advised in the premises having heard the testimony of these witnesses, examined the exhibits and other evidence proffered during said hearing . And having made its findings of fact and conclusions of law on the record at the conclusion of the hearing:

**IT IS HEREBY ORDERED AND ADJUDGED:**

1. Plaintiff Generes' objection to the claim filed by the defendants Edward and Patricia Morrell is denied.

2. The claim heretofore filed by defendants Edward and Patricia Morrell in this estate is allowed in full .

3. Plaintiff Generes's counterclaim against the defendants is denied.

4. Each party shall bear their own costs in this matter.

5. The Clerk of the Court is hereby directed to enter final judgment in favor of defendants Edward and Patricia Morrell and against the plaintiff Tasker Generes in accordance with this order.

Dated: July 8, 1993

_____

David H. Coar
United States Bankruptcy Judge

Prepared and Submitted by:

Mark E. King, Esq. (ARDC No. 06190091)

DAVID B. KAHN, LTD.
200 West Adams Street, Ste 2701
Chicago, Illinois 60606
312 / 855-0955

**PREVAILING PARTY SHALL FORTHWITH SERVE A COPY OF THIS ORDER ON THE DEBTOR(S) AND ALL PARTIES ENTITLED TO NOTICE.**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: | ) | June 30, 1993 |
| TASKER GENERES and DOROTHY | ) | 2:00 P.M. |
| GENERES, | ) | Chicago, IL |
| Joint Debtors, | ) | Chapter 1 1 |
| TASKER GENERES | ) | Judge Coar |
| Plaintiff, | ) | No. 92 A 01283 |
| | ) | |
| | ) | |
| EDWARD L. MORRELL | ) | |
| and PATRICIA MORRELL, | ) | |
| Defendants. | ) | |

**TRANSCRIPT OF PROCEEDINGS**
**BEFORE THE HONORABLE DAVID H. COAR**

**APPEARANCES:**

**For the Plaintiff:**

Mr. Ronald L. Sandack
(Smith, Williams & Lodge)
55 West Monroe Street
Chicago, Illinois 60603

**For the Defendants:**

Mr. Mark King
(David B. Kahn Ltd.)
200 West Adams Street
Suite 2701
Chicago, Illinois 60606

THE CLERK: **92 A 012B3, Generes versus Morrell.**
THE COURT: Good afternoon. Are we ready to proceed?
MR. SANDACK: Your Honor, my name is Ron Sandack. I'm one of the attorneys representing the plaintiff in this adversary matter, Tasker Generes. Your Honor, I have not yet filed an appearance, and I would seek leave to file my appearance instanter.
THE COURT: All right.
MR. SANDACK: We have no objections.
THE COURT: All right, that's fine.
MR. KING: Your Honor, I'm Mark King. I represent the defendants, Ed and Patty Morrell. I have previously filed an appearance in this matter.
THE COURT: Mr. King, let me just make one comment. I took a look at your witness list. If I had seen it earlier, I would have stricken it. Page 2 of the pre hearing order says. "At least 14 days prior to the hearing date the parties are to exchange and provide chambers with the names of all witnesses they intend to present at trial, together with a brief summary in the area of testimony they wish to present." I don't consider the statement, "All trialable issues," to be responsive to that pre hearing order. It's unhelpful to say that they'll testify about everything.
MR. KING: I apologize, your Honor. I was under the impression in reading your order that that would have been a sufficient response. I'm happy to be more specific, and, certainly, there was no intent to mislead the Court or the plaintiff about the nature of their testimony.
THE COURT: I didn't take it as an intent to mislead. It's just unhelpful. It doesn't provide any assistance whatsoever for me in preparing for the hearing, and I'm sure for the other side in preparing for the hearing in trying to figure out what the witnesses are here for and for preparation. It's just not helpful. So in the future, please, be a little more helpful and try to – at least if it's not clear from the letter of the order, which I think it was, provide the information requested.
MR. KING: Please accept my apologies.

THE COURT: No apologies are necessary. All right, are
MR. SANDACK: Your Honor, I have one housekeeping matter, and I'd like to address the Court. Mr. King and I did confer. I have amended my proposed findings of fact and conclusions of law. I have a scribblers error. I have talked to Mr. King about it, and I also wish to convey my apologies for not putting the jurisdictional statement on my first conclusions of law. It is included in my amended proposed findings of fact. May I hand it to your clerk, sir?
THE COURT: Yes, sir.
MR. SANDACK: Thank you.
MR. KING: Your Honor, the parties here essentially are going to present the same witnesses in their Cases in Chief. And if it's acceptable to the Court, my desire would be to not cross examine the plaintiff in this matter until we get to the Defendant's Case in Chief. The Plaintiff's Counsel has no objection to that, but, of course, we'll take our direction from the Court.
THE COURT: That's fine.
MR. SANDACK: I think we're prepared, your Honor.
THE COURT: All right.

**OPENING STATEMENT**
**by Mr. Sandack**

MR. SANDACK: If it please the Court. Your Honor, my name is Ron Sandack, and I am one of the attorneys representing Tasker Generes in this adversary matter against Mr. and Mrs. Morrell. The Plaintiff seeks, your Honor, a judgment against Mr. and Mrs. Morrell pursuant to a holdover tenancy which occurred when Mr. and Mrs. Morrell held over beyond the written expiration date on their lease. We believe the evidence will demonstrate and show the following: One, on or around December 18, 1990, the Morrells entered into a written lease with the plaintiff concerning rental property commonly known as 1829 Happ Road. I'll refer from time to time to it as the Happ Road rental property because Mr. Generes lives on Happ road as well. The written lease was for six months in duration at $2,200 per month. There were other provisions, of course, and one of the more significant provisions was that the lease contained a provision whereby plaintiff could elect to treat the Morrells as holdover tenants if they remained on the property beyond the expiration date written in their lease. The expiration date in the lease was June 17, 1991. Judge, I believe the evidence will show that Mr. and Mrs. Morrell remained in possession of the Happ rental property beyond the expiration of the written lease. We believe the evidence will also demonstrate that on or around July 1 of 1991, 15 days

after the written lease expired by its own terms, Tasker Generes prepared a notice to the Morrells notifying the Morrells of his intent to treat the Morrells as holdover tenants in accordance with the provisions of the written lease. The evidence will further demonstrate that Tasker Generes delivered the notice to the Morrells on or about July 1 as well. He fulfilled all contractual obligations he was required to fulfill under the written lease. I believe, your Honor, the Morrells will attempt to demonstrate that in April of I991 or May of 1991 or maybe even further, that the parties to the written lease orally modified the written lease. They're going to contend that Tasker Generes agreed orally to extend the lease either for a two-month duration or month to month. I think the difference is significant, but I believe that is what they're going to attempt to show. Mr. Generes will testify that at no time did he modify the written agreement either in writing or orally. That the written provisions of the contract should remain intact and should be held to be that which they are. Your Honor, it's uncontroverted that the Morrells vacated the property on or around August 17th, 1991, two months after the written expiration date in the written contract. After the Morrells vacated the property, Mr. Generes aggressively sought to relet the property. He put a sign outside the property, and he listed the property in the paper as an advertisement seeking renters. Unfortunately, due to market conditions beyond his control, he was unable to relet the property until Nay of 1992. Eight months transpired where there were no renters in the property. Your Honor, we are seeking judgment for the eight months pursuant to the holdover tenancy which was invoked by Mr. Generes pursuant to the written lease at $2,200 per month. We additionally seek $800 as liquidated damages for each late payment that's provided for in the contract. And finally, your Honor, we're seeking all cost, collection and attorneys' fees which are clearly provided for in the written lease. Thank you, your Honor.

**OPENING STATEMENT**

**by Mr. King**

MR. KING: May it please the Court. My name is Martin King and I'm here, as I've said, representing the defendants, Ed and Patty Morrell. Your Honor, the plaintiff here has the burden of proving his case, and this is a burden he cannot meet. It's the defendants' theory in this case that they are the victims of fraud. The fraud perpetrated by the plaintiff in an effort to, essentially, use this Court and process in this court to extort money from the defendants that the plaintiff is not entitled to. The Morrells, however, do not have to prove that. They simply have to stand on the fact that they do not have the burden of proof here. Much of what Counsel has said in his

opening statement is simply not controverted. Let me go over a couple of elements that he didn't bring out and which we believe the evidence will be virtually conclusive on these points. The Morrells sought to rent this house of the plaintiff because their home was badly damaged in the fire on or about December 15, 1990. Within three days of that time they had negotiated a lease with the plaintiff and had specifically negotiated for a six-month tenancy. The reason, of course, because their home was being rebuilt, and they hoped to have their home rebuilt and be able to move in at the end of that six-month period. Their insurance company under the terms of their insurance policy, the evidence will show, was responsible for reimbursing them for the rental cost here which were substantial under the lease. The evidence will also show that on or about April or May of 1991, approximately one or two months before the expiration of the written term of the lease, my clients determined through consultation with their contractor who was working on the principal residence, that their residence would not be available to them in the middle of June, the approximate time the written lease with the plaintiff would expire. At that point the defendants began negotiating with their insurance company to determine whether the insurance company would reimburse them for the additional time in the rental property. And simultaneously and very reasonably, they began negotiating with the landlord to the same effect. The parties reached an agreement under which the Morrells could stay at the property for, to quote the landlord, "As long as they wanted." It was perfectly agreeable to him, and that's what the evidence will show. The Morrells did, in fact, stay at the rental property past the 17 computed – the date upon which the lease was to expire but for this oral modification. The parties in telling here will not only be the testimony of the plaintiffs, which will be very credible and straightforward, but also the testimony of the contractor who was working on the plaintiffs' house and who will testify that he advised the Morrells that their property would not be ready until approximately the middle of August. Also telling will be the testimony of the plaintiff in this matter. The plaintiff by the 17th of June claims to have had no consultation what soever with the defendants about whether they were going to move out of the property or remain in the property. The evidence will show that as of the 17th of June, even though he had no consultation what soever, he had made no effort to list the property for rent through Pioneer Press advertisement. He had not taken the sign that he normally places in front of the property, the for rent sign, and placed it there. He simply made no efforts at all despite the fact he could not have possibly known, under his

own version of the facts, whether the Morrells were going to stay on the property or not. I believe the evidence is also going to show that after the Morrells moved out in the middle of August 1991, they immediately began asking the plaintiff for the return of their security deposit and attempting to discover when their security deposit would be returned. Again, a perfectly reasonable and rational thing to do at the end of the tenancy. The evidence – and this will be the plaintiff's evidence out of his own mouth – is going to show that in the course of these conversations just as the defendants were asking for the return of their security deposit, not once did the plaintiff inform them that they were not entitled to a return of their security deposit because their tenancy had been extended by the act of this July 1st letter that is in dispute between these parties. That the tenancy had been extended for an entire year and did not, in fact, expire until June of 1992. Not once did the plaintiff claim to have told them that. Not once did the plaintiff claim to have told them that the security deposit would be held pending his effort the property. Even more telling and more importantly, after the plaintiffs left this property – or excuse me, I keep mixing this up. After the defendants left the property, there is no dispute whatsoever that they did not pay a single dime of rent on this property. They did not pay on the day they left, which was approximately August 17, 1991. A day that rent would have been due if the lease had been extended as the plaintiff claims. They did not pay in September or October or December. And what is telling about this, your Honor, is, again, plaintiff's own evidence out of his own mouth will show that he made absolutely no effort to demand payment of this money. He did not call them. He did not write them a letter. These parties lived in reasonably close proximity to one another, and he did not make any effort to contact them and tell them that they were in default on the rental obligation. The evidence will show, and, again, we think conclusively, he did not do this because they were in default on the rental obligations. The evidence will further show that within a couple of weeks after the defendants had moved out of the property, the plaintiff claims to have done an inspection of the physical condition of the property. And, again, his own evidence will show that as a result of that inspection, he claims approximately $8,000 worth of damage to the property. Again, this is more than – almost twice the security deposit that he was holding, $4,400. Once again, in the course of this entire dispute and until this adversary claim was filed – and more properly the evidence will show to the very eve within a week or two of the filing of this adversary complaint, more than a year after the defendant's left the property, not once did the plaintiff make any effort to collect this money.

Not once did he make any effort to document exactly what claims he was making. The evidence will show further that from and after the time the defendants left the property they diligently schedule, first, with the plaintiff, and then subsequently with the bankruptcy attorneys after the filing of this proceeding, to find out when they were going to get their security deposit returned. Not once in the course of those discussions which happened virtually monthly after this time, monthly between Mr. Morrell and the bankruptcy attorney, were they ever informed of the magnitude of the claims the plaintiff was making or even the substance of the claims the plaintiff was making. We believe the evidence will show that this behavior would have been completely irrational had the Morrells realized that they could be held over for an entire year as the plaintiff claims to have given written notice of doing so. And finally we come to the written notice itself, a letter dated July 1, 1991. In addition to all the reasons just given, the evidence as to the delivery of that letter will be as follows: The plaintiff, an attorney for 20 years, claims to have written this letter and walked next door with it. This letter that held over the tenancy of the Morrells for an entire year, even though he had no tenants waiting to move into the property, even though he had not advertised the property for rental, even though at that time he claims to have had no knowledge of what the Morrell's plans were or what their intentions were. He walked next door with this letter to hand deliver. Finding the door opened, he says he knocks and no one answers. The plaintiff, again, out of his own mouth, will say that he opens the door. The door itself was opened, and he sets this letter virtually on the front doorstep of the defendants in an envelope addressed to them and walks back to his house. And then the evidence will show he did nothing. He did not call them to confirm that they received the letter. He did not in any way attempt to follow up to make sure the understood the implications of this letter. And, more significantly, as an attorney, the evidence will show he made no attempt to deliver this letter in any way that would provide notice of receipt or any evidence of receipt. And the evidence will show that when the defendant mounts the stand he will very credibly testify that this letter was never delivered to them. It was never prepared, and it was never written. Thank you, your Honor.

MR. SANDACK: Your Honor, I'd like to call the plaintiff, Tasker Generes to the stand.
THE COURT: All right .

**MR. TASKER GENERES, WITNESS, SWORN,**
**DIRECT EXAMINATION BY MR. SANDACK:**

Q. Sir, would you kindly state your name and spell it for the record? A. Tasker, T-a-s-k-e-r, Generes, G-e-n-e-r-e-s. Q. Sir, where do you reside at? A. 1845 Happ Road, Northbrook, Illinois. Q. And how long have you resided in that residence? A. Since about 1979 or '80. Q. Sir, what is your occupation? A. I'm a lawyer. Q. What was your previous occupation prior to being an attorney? A. I was president of Phytogen. Q. How long have you been licensed to practice law? A. Since 1972. Q. And what jurisdictions are you licensed to practice law? A. In California and Illinois and in the Supreme Court of the United States. Q. Other than being a licensed attorney, what other employment have you had? A. I've been an executive of multinational food companies. Q. Sir, where did you receive your undergraduate degree? A. The University of California at Berkeley. Q. And what degree did you receive? A. Bachelor of Arts in mathematics and physics. Q. Have you received any graduate degrees other than law? A. Yes. Q. And what degrees are those? A. Masters of Science. Q. And at what institution did you receive the Masters of Science? A. Stanford University. Q. Were did you attend law school? A. DePaul University. Q. Other than residential property, do you own any other any other properties? A. Yes. Q. And where are such properties located? A. In California, a very small parcel in Minnesota, and, of course, 1829 Happ Road in Northbrook. Q. How long approximately did you own these other properties? A. Over ten years.

MR. SANDACK: Your Honor, for purposes of today, I'll refer to the Happ Road rental property so as not to confuse anyone as far as his residential property.

BY MR. SANDACK: Q. Sir, would you please describe for the Court the Happ rental property? A. It's a four bedroom – three bedroom ranch style home in a very good neighborhood with very good schools. It has a two-car garage, circular drive, nice size lot, skylights, center-island kitchen, ceramic, and hardwood flooring. It's nicely maintained. Q. How long have you rented out this property? Q. Since about 1979 or '80.

**Q. Since you began renting this property out, how many tenants have possessed this property? A. Five.**

Q. And who was your first tenant? A. Dr. Boon. Q. And how do you spell his last name? A. B-o-o-n. Q. And do you know approximately when he took possession of the rental property? A. About 1979 or '80. Q. And do you know approximately when he left the rental property? A. About 1987.

Q. Did you extend from time to time Dr. Boon's lease? A. Yes. Q. What was the procedure utilized for extending his lease? written letter extending my Cole lease. Q. Did Dr. Boon ever reside at the Happ rental property without a written lease? A. No. Q. After Dr. Boon, who was your next tenant at the Happ rental property? A. Ms. Necier. Q. How do you spell Necier? Do you know? A. No. Q. Did you have a written lease with Ms. Necier? A. Yes. Q. And approximately when did that lease begin? A. About November of 1987. Q. Approximately when did you vacate the premises? A. About a year later. Q. Did you ever extend her lease? A. No. Q. After Ms. Necier resided at the Happ rental property, who was your next tenant? A. Paula and Harris Rittoff. Q. And did you have a written lease with the Rittoff's A. Yes. Q. When did the Rittoffs take possession of the Happ rental property? A. Immediately upon Necier leaving. Q. Approximately do you know when it was? A. November of 1988. Q. And do you know when the Rittoffs vacated the premises? A. A little before the Morrells moved in. Q. Was the Rittoff's lease ever extended? A. Yes.

**Q. And what procedure or method did you utilize to extend the Rittoff's lease? A. I used a letter to extend the Cole lease form I used. Q. Did the Rittoffs ever reside at the Happ rental property without a written lease? No.**

**Q. Prior to the Morrells, did you ever orally rent the Happ rental property to anybody? A. No.**

Q. And why not? A. To protect myself. Q. I'd like to turn your attention to December of 1990. How did you come to meet Mr. and Mrs. Morrell? A. I believe Pat Morrell called me on the phone. Q. Did you meet with her subsequently? A. Yes. Q. Please tell the Court the substance of your first meeting with Mrs. Morrell? A. She had told me her children had accidentally caused her house to catch on fire causing damage and that they had to find some other place to live. That she was temporarily in the Holiday Inn and living with four kids in a hotel room, and it was driving her crazy. So she was quite anxious to find a place. She was looking at several other places and she, at that time, didn't have her husband with her. Q. At the time you first met Mrs. Morrell was the Happ rental property vacant? A. Yes. Q. And do you know how long it was vacant? A. Not very long, a month maybe. Q. How did you advertise for prospective renters? A. I have a nice metal sign that says, "For rent," with my phone number on it that I put in the front yard. And I advertise in the Pioneer Press, Northbrook Star. Q. Did you subsequently meet with Mr. and Mrs. Morrell after your

initial meeting with Mrs. Morrell – or phone conversation, excuse me? A. I believe so. Q. Can you tell the Court the sum and substance of your conversation and or meeting? A. The Morrells, they looked at the place. I believe I had taken Mrs. Morrell through the house and then her husband came back with her and looked at it. They mentioned again that they were looking at other places. We talked about the terms of the lease. At some juncture I gave them a lease, and they said they had to review it with their attorney or their insurance people because of the fire. Q. After this meeting that you've just described, did you have an opportunity to meet with Mr. and Mrs. Morrell again? A. Yes. Q. And what occurred at this next meeting? A. They had some changes they wanted to make in the lease, and we made changes in the lease to include their dog. And in this consequence I increased the security deposit from one month to two months for damages, and we indicated that in the rider. There may have been some other changes. Q. Was a written lease eventually signed with the Morrells? A. Yes. Q. And do you know approximately when it was signed? Q. On or about the date there on the lease itself it says the date it was signed. A. I don't recall the date.

MR. SANDACK: Your Honor, Mr. King and I stipulated to Exhibit 1, which is a copy of the residence lease. I'd like to tender your Honor with a copy at this time.

THE COURT: All right.

MR. SANDACK: May I approach the witness?

THE COURT: Yes, sir.

BY MR. SANDACK: Q. Sir, I'd like to show you what is entitled, "Residence lease." Would you take a few moments and review it? It's marked as Exhibit 1. A. I'm ready. Q. Sir, is Exhibit 1 the rental written lease you entered into with the Morrells? A. Yes, it is. Q. And reviewing the top left side it says, "Date of lease." It says, "12-18-90." Does that refresh your recollection as to when you entered into the written lease? A. Yes. Q. Sir, what was the length of the written lease with the Morrells? A. From 12-18-90 to 6-17-91. Q. That's a six-month period, correct? A. About, yes. Q. At that time, was that your customary lease period? A. No. Q. Sir, directing your attention to the backside of Exhibit 1, you'll see what seems to be your signature. Is that your signature, the second line? A. Yes. Q. And if you'd look to the backside of the rider, Page 44 it's marked. Is that your signature? A. Yes. Q. Did you see the Morrells execute Exhibit 1? A. Yes. Q. What was the monthly rent? $Z,200 a month. And so there's a rider attached to Exhibit 1, correct? Yes. Four pages, or actually two pages

utilizing both sides? A. Yes. Q. Is that the form that was attached to the original lease? A. Yes. Q. Did Mr. Morrell execute that document? A. Yes. Q. After execution of Exhibit 1, the written lease, what occurred thereafter? A. They moved in. Q. Your property is where in conjunction to the Happ rental property? A. Next door. Q. And as you live next door, what contact if any did you have with the Morrells? A. Very little.
Q. Did there ever come a time when a problem arose at the Happ rental residence? A. Yes.
Q. Do you know approximately when that occurred? A. About February of '91. Q. And what was the problem? A. They had a problem with the garage door.
Q. Who told you about this problem? A. Ed Morrell. Q. And how did he tell you about the problem? A. He left a note in my door about the problem. He wanted to be reimbursed for the repairs that were necessary to make that garage door function properly.
Q. Again, just so it's clear, how did you receive notification? A. He left it in my door. Q. And how did the Morrells pay rent to you? A. They left it in my door. Q. On a monthly basis? A. Yes. Q. Do you ever recall receiving a check in the mail by the Morrells for monthly rent? A. No.
Q. At the time of the lease, were you aware of why the Morrells were living at the Happ rental property? A. Yes. Q. And can you explain to the Court where your residence is in conjunction to the Morrell's home that was consumed by the fire? A. Their home is about two miles down Willow Road, and they're about equal. So it's probably about four miles away from my house on Elaine. So, it's nearby. Q. What was occurring at the Morrell's home during the lease with the Morrells? A. It was being repaired, and they would be bringing in a lot of smoke-damaged materials and storing it in the garage when they worked on cleaning and things like that at the rental house. Q. In or around June of 1991, did you have an opportunity to inspect or view the reparations being made to the Morrell's home? A. I drove by. Q. And what did you see in June of 1991? A. It seemed like it wasn't ready. Q. On June 17, 1991, the day the written lease was to expire, did the Morrells vacate the premises? A. No. Q. Prior to June 17, 1991, did you receive any written correspondence, a note, anything in writing from the Morrells telling you that they were going to stay beyond the written expiration of the lease? A. No. Q. Did you ever have any conversations with Mr. Morrell or Mrs. Morrell concerning extension or modification of the written lease, which is Exhibit 1 in your right hand? A. No. You had no conversations with them about extending the lease? A. No.

Q. When you observed, in the middle of June of 1991, that the Morrells had remained at the Happ rental property beyond the written expiration date in their contract, what did you do? I prepared a notification under my lease for them. Q. What was the significance in your mind, if there was any, of the Morrells staying in the premises beyond the written expiration? That they wanted to stay on. After you noticed the Morrells – after the Morrells had remained and you noticed they remained in the Happ rental property, what did you next do? A. I prepared and delivered my notice under Article 8 of the lease to the Morrells.

MR. SANDACK: Your Honor, I'd like to approach and hand you what I've marked as Exhibit 2.

BY MR. SANDACK: Q. Mr. Generes, would you please review what's been marked as Exhibit 2? A. Yes. Q. What is that document, sir? A. This is the document to notify them of my election under the lease to renew it for another term at the same rent. Q. When did you prepare that document? A. On about July 1st. Q. Did you prepare that document? A. Yes, I did. Q. And you prepared it on or about the date it bears? A. Yes. Q. And why did you prepare this document? A. To give them notice of my election under Paragraph 8. Q. After you prepared Exhibit 2, what did you do? A. I walked next door with it, after putting it in an envelope, and knocked on the door. The door was somewhat unlatched and kind of opened and so I hollered, "Is anyone there?" No one was there, so I put it down conspicuously where anybody could see it and left and shut the door. Q. Just so the record is clear, you walked it over and dropped it inside the Morrell's home? That's right. Q. Do you recall how you received payment for the month of August? A. They dropped it off between my storm door and my house.

MR. KING: Objection, your Honor. There's some ambiguity here since we're dealing with months that begin in the middle of the month. Are we dealing with the month that begins in August, or the month that begins in July?

MR. SANDACK: That's fine, your Honor.

BY MR. SANDACK: Q. When is the last check you received from the Morrells, if you recall? A. Well, I don't remember the exact date. Q. That's fine. The approximate time? A. Approximately when it would be due and when it was put in my door. Q. And that was for what month, sir? A. It would have been for August. Q. On or about August 17th of 1991 what occurred? A. They moved out. Q. How do you come to notice the Morrells moved out? A. I saw that they moved out. Q. At any time, sir,

after you served Exhibit 2, which is dated July 1, 1991, had you had an opportunity to discuss that letter with either Mr. Morrell or Mrs. Morrell? A. Yes, in talking to Ed Morrell. Q. When did this conversation occur? A. When he called me. It was two calls – and I'm not sure whether it was – I believe it was the second call from his –he was at his home in Wisconsin I understand, and he was there after he left our place for some time. Q. Let's put this in perspective. You said after they vacated the premises? A. Yes. Q. Do you know what month they vacated the premises in? A. A little after August 17th. Q. Okay, and you said he called you. He being Mr. Morrell? A. Right. Q. Okay, and what did he say to you and what did you say to him? A. I told him that I tried to get the house rented for him.

**Q. In your mind what was the significance to Mr. Morrell?**

**A. That he didn't object or give any concern when he realized he had an obligation under the lease.**

Q. And, sir, what were you doing? You said you were going to try and relet it for him?

A. Right I put up the For Rent sign, the metal For Rent sign, and I placed ads in the paper. And how long did you place ads in the paper?

A. For a long time, until I rented it. Q. When did you finally rent the Happ rental property after the Morrells had vacated the premises? A. About eight months later. Q. And who did you rent to? A. Mr. and Mrs. Sunsuebay. (phonetic) Q. In the eight month interim between tenants, did you ever receive a payment from Mr. and Mrs. Morrell for rent? A. No.

**Q. Sir, did you have a demand payment in any way, shape, or form from the Morrells after they vacated the premises?**

**A. In my filings in the bankruptcy proceedings, I indicated on the filings that there was a holdover tenancy. Those things were filed in the bankruptcy filings and were done in about August when we filed bankruptcy. It was simultaneously practically with this lease. And so the various schedules in the bankruptcy filing indicated our status. We disputed their right to the security deposit and indicated in the schedules that there was a holdover tenancy of 2,200 a month.**

Q. Sir, why didn't you walk next door or place a phone call to the Morrells after they vacated the premises and say, "Hey, you owe me money for back rent or holdover tenancy?"

A. I was at that time having intense difficulty with a lot of other things. I was handling getting my bankruptcy schedules filed and working with my attorney, and, so, that was basically it. I understand you had bigger problems at that time? I had substantial problems.

Q. Sir, last question. The security deposit, what did you do with the Morrell's security deposit that they had given you at the beginning of the written lease? A. I retained it. Q. And did you apply it against their indebtedness? A. Basically, yes.
MR. SANDACK: Your Honor, I have no further questions of this witness
MR. KING: Your Honor, I know I indicated that I was going to recall Mr. Generes, but I'd like to continue with cross examination. If he'd like to consult with Counsel before, I have no objection. But I do want to proceed with cross examination.
MR. SANDACK: That's fine. I have no problem with that, your Honor. I was just going to tell the Court – since he's going to have cross examination now, I won't close my case. I'd like to retain the opportunity to do any redirect. May I take the exhibits, unless Mr. King is going to use them?
MR. KING: You can take them.
MR. SANDACK: Thank you, Judge.
MR. KING: Your Honor, I was under the impression that we had delivered these exhibits to your chambers. Do you have them?
THE COURT: Yes, sir. MR. KING: Because I didn't bring the extra copies.

**CROSS EXAMINATION**
**BY MR. KING:**

Q. Mr. Generes, my name is Mark King. You may remember we met at your deposition several months ago? A. Yes. Q. As I understand it, sir, your claim here is that Ed and Patty held over beyond the expiration of the lease; is that correct? A. Yes. Q. And that the lease itself under the terms of the lease that you have been shown a moment ago, it expired on June 17th, 1991; Now, as I understand it, by the 1st of June of 1991, you had no conversations, as you've said, with Ed and Patty about whether they were going to continue the tenancy of the property if they needed to hold over, or, in fact, anything at all regarding their retention as of June 17th, 1991; is that correct? A. Yes. Q. The Morrells – I think you said in the rental property they were living next door to you; is that correct? A. Yes. Q. You were approximately – I think you speculated at your deposition that it was about 50 feet between the houses? A. Yes. Q. So as of the 1st of June as far as you knew, to the extent of your knowledge, the Morrells were going to be vacating the premises at the end of the lease term; is that correct?
Q. Well, they had had no discussions with you; is that correct? About staying at the property? A. Yes. Q. Upon what do you base the fact that they might have stayed at the property? I'm talking as of June 1 now? A. Yes,

you're talking as of June 1. I understand. Q. Under what basis did you make that statement? A. I made that statement on the basis that if they were going to leave, they would have told me. Q. Well, the lease required them to leave on June 17th, did it not? A. Yes. Q. Do you believe that they would have had to tell you that they were honoring the obligations under the lease? A. No, but most people just tell you. Q. But they didn't? A. No. Q. And you assumed from that they weren't leaving the property? A. Yes, and also from looking at the property. Q. I understand that. But they could have moved to some other place rather than your house? A. yes Q. They could have moved in with relatives for example; is that true? A. It's a possibility. Q. They could have moved in with friends? :A. It's a possibility. Q. As of the 1st of June, sir, what steps had you taken to advertise your rental property for rent starting on June 18, 1991? A. None. Q. Had you placed an ad in the Pioneer Press? No .Q. At your deposition you brought a very large for rent sign. Did you place that sign in front of the property? A. No, I hadn't. Q. If the Morrells had moved out of the property on June 17, 1991, you were in no position to rerent it; is that correct? A. I could put it up for rent. Q. I understand that. But there was certainly no way you were going to rent it as of June 18, 1991? A. No, it would have to be cleaned and painted. Q. So you would have – so if I understand it correctly, had the Morrells left on June 17, 1991, the property would have been vacant for some period of time after they left? A. Yes. Q. Did you at any time before the 17th of June, 1991, put up your for rent sign or place an ad in the paper advertising the property for rent? A. I'm sorry. I didn't get the date. June 17th, 1991? Before then, no. Q. Yes. Earlier we were talking about the 1st of June. Now we've moved to the 17th of June. A. Oh, I see. I didn't catch that. Q. But in any event, the sign had not been placed by the 17th. A. No. Q. Nor the ad? A. No. Q. As I understand it, before the Morrells moved in, the property was vacant for about two months at the end of 1990; is that correct? A. That's about right. Q. And during that two-month period you had an ad in the paper, did you not? A. Yes. Q. And you had your sign out in front, correct? A. Yes. Q. And it still took you two months to rent the property? A. Yes.

**Q. So when the Morrells continued to stay in the property on June 18, 1991, they paid rent for that next lease month, didn't they? A. Yes. Q. And how much was the rent again? A. $2,200. Q. They paid you by check?**

A. Yes. When you received that check, did you contact the Morrells and ask them why they were paying you additional rent instead of moving out as

the lease required? No. Did you contact the Morrells to ask them how long they were going to remain in the property? Q. No. Q. Did you write the Morrells a note and leave it in their door asking them what their intentions were? A. No. Q. As of the middle of June based on the rental rate of $2,200 a month, the Morrells had already paid you approximately $13, 000 in rent during the six-month lease period; isn't that correct, sir? A. Yes. Q. And they paid you every month that they lived in the property, correct? A. Yes. Q. Now, as of the middle of June when you count the security deposit that you were holding from the Morrells, you had approximately a $20,000 return on that property; is that correct? The Morrells had paid you approximately S20,000? A. I'm sorry. I don't understand what you're saying. Q. Okay. They paid rent of approximately $13, 000, correct? Yes. Q. And they also paid you a security deposit of about S4,400, correct? A. Yeah. Q. And they stayed an additional two months at the property, correct? A. Yes. And that's another S4,400, correct? Yes. Q. And they paid that to you? A. Yes. Q. So during the time the Morrells were at the property, they paid you a total of over S20,000; isn't that correct? A. I believe that's the way the numbers calculate out. Q. I'm sorry? A. Yes, I think that's the way the numbers calculate out. Q. As it turned out, as I understand it, you didn't rerent this property after the Morrells left in May of 1992; is that correct? A. Yes. Q. And during this period you had an ad in the paper, correct? A. Yes. Q. And you had your sign out in front? A. Yes. Q. So taking your testimony at face value, isn't it true, sir, that the Morrells continuing in the property for an additional two months gave you a gain of $4,400 which you otherwise wouldn't have? Q. Had they moved out in June in other words, you wouldn't have gotten that 4,000 of rent? Do you understand the question? A. I'm sorry. I didn't understand. Q. If the Morrells had left at the end of the written term, they would not have paid you rent for the month of July, correct? A. Oh, yes, that's right. Q. And they wouldn't have paid you rent for the month of August? A. Yes, that's right. Q. And, in fact, the property remained vacant until May of 1992, correct? A. That's the way it looks like it turned out. Q. So the holdover of the Morrells, if you call it that, enriched you about S4,400 over what you would have received had I they left on June 17th?

MR. SANDACK: Your Honor, I would object. That question is clearly speculation. We know for a fact they remained in the property. I don't understand what this question – what he's trying to invoke from this witness. The math is what the math is. It's a little confusing, and it does ask for speculation. On that basis, I'm going to object.

THE COURT: I'll overrule the objection.
THE WITNESS: I guess so.
BY MR. KING: Q. On the 1st of July when you supposedly delivered this letter that you testified about earlier, you had no reason to believe that the Morrells were really going to continue to rent your house until June of 1992; is that correct? A. Could you repeat the question? Is it that I had no reason to believe that the Morrells would continue to rent the house? Q. As of the 1st of July when you say you delivered this letter that, I believe, is Plaintiff's -Exhibit 2, I think, as of the 1st of July you had no reason at that time to believe that the Morrells were going to need to continue to occupy the rental property until June of 1992; isn't that correct? A. That's correct. saying? Q. I want to make sure I understand what your testimony is here. Even though the Morrells paid you an additional $4,400 of rent during the two months that they stayed beyond June 17th, and even though you knew that the Morrells were not going to need to stay in the property the additional year, you renewed their lease for an entire year anyway, is that the substance of what you're saying?
MR. SANDACK: Your Honor, before the witness answers that question, I'm going to object to the mischaracterization of saying, "An additional $4,400" The Morrells, by their own pleadings say that there was a two month extension. So there was no unjust enrichment here, your Honor. I think the characterization Counsel is placing on that is mischaracterizing the evidence.
THE COURT: I'll overrule the objection. I think the witness understands the question.
MR. KING: Could you answer the question?
THE WITNESS: I'm sorry, the dialog distracted me. Can we go over it or have her read it back?
MR. KING: May I have the court reporter read that back, your Honor?
THE COURT: Yes. (Record read.)
THE WITNESS: Yes.
BY MR. KING: Q. When the Morrells moved out in August, it's my understanding that your position is that they owed you rent for that entire ten-month period that follows August 17th, 1991; is that correct? A. They owed me rent until I rented that again, right. Q. Which is approximately 16, $18,000 more than they've already paid you; is that correct? A. That's correct.

**Q. Sir, under the circumstances just out, do you think it's fair and equitable that the Morrells have to pay you for that entire year when they weren't in the property?**
**A. Yes, because that was the lease that they agreed to, the terms that they agreed to. And it's better for them to take the risk than for me of not renting it out. Who knows what the times are going to be like.**
Q. As I understand it, sir, you didn't have a tenant who was ready to move into the property on June 18; is that correct? A. That's correct. Q. And you didn't have a tenant on June 19th either? A. Nope. Q. And between, in fact, June 17, 1991 and July 1st, 1991, when you claimed to deliver this letter, Plaintiff's Exhibit No. 2, you didn't have a tenant at any point in that period? A. No. Q. You didn't turn away any prospective renters in other words? A. No. Q. And no one inquired about renting the property because you had not advertised the property; is that correct?
A. Exactly. Q. Going to this July 1st letter, and I'll show it to you. It's Defendant's Exhibit G. I'd like to hand that to you. This is identical to Plaintiff's Exhibit No. 2, which you saw earlier. Q. As I understand it from your testimony, you stated the purpose of delivering this letter was to exercise the right given you under the lease -A. Yes. Q. – to renew the lease for a one-year period in the event of a holdover; is that correct? A. Yes. Q. Now, as of the 1st of July, as I understand it, the Morrells were not delinquent on their rent? In other words, they paid you for the rent beginning June 18th; is that correct? A. Yes. Q. When they paid their rent, sir, on June 18th or about June 18th, 1991, did you inquire about their intentions? I believe you said you didn't, but I want to make sure I have that refreshed in my mind. A. I didn't. Q. You didn't. You just took the rent from them, as I understand it? A. I took the check and deposited it in the bank, correct.
Q. And between the time that they paid you that rent and the 1st of July, you had not contact with them whatsoever about their intentions or plans with respect to the rental property? A. No.
**Q. Did you have -- well, let me back up. When the Morrells held over and stayed at the property on June 18th, that was a violation of the lease; isn't that true?**
**A. The lease provides for holding over.**
Q. The lease also provides a termination date, does it not? A. It provides a termination date, but you'd have to look at those things in conjunction. You can't look at them independently. Q. The lease requires them to vacate the property as the termination of the lease, does it not?

A. Yes, I did not file an eviction suit, if that's what you're getting to.
**Q. No, that's not what I'm getting to al all. What I'm getting to is as of June 18, 1991, they were in violation of material terms of the written lease; is that true? A. Yes.**
Q. Did you take any steps to notify them about their default in this term of the lease?. A. As I've said, I didn't file an eviction suit. I didn't do anything like that. Q. As I understand it, this letter that you have in front of you, Plaintiff's Exhibit G, this is your first communication with the Morrells about their holdover in the property, under your testimony; is that true?
A. I think so.
**Q. Now, the purpose of this letter, as you've talked about, was to exercise the right that was granted you under the lease in the event of a hold over. That's your testimony, correct? A. Yes.**
**Q. And failure to deliver the notice means that you cannot exercise that right; is that true?**
**A. No. I believe that under common law acceptance of the rent constitutes a holdover tenancy too. So either way, whether you use common law or under the lease, it's still a holdover tenancy.**
Q. Sir, if you'd look at Defendant's Exhibit G at the language that you quote from Paragraph A of the written terms of the lease. The written terms of the lease gives you 30 days after the beginning of the holdover in order to deliver this notice; is that correct? A. That's correct.
**Q. And you would agree with me, sir, that if you waited until the 31st day to deliver this notice, you would not be able to exercise the rights granted to you under the lease; is that correct?**
**A. The common law rights, they say you could exercise. It's a matter of just merely accepting their checks and continuing them without suing them for eviction. That's my understanding of the holdover law.**
Q. Well, I don't want to get into a discussion of the understanding of the law here, but what I'm trying to understand is this letter purports to exercise a right granted under the written lease, does it not? A. Yes.
**Q. There is no reference in here to any common law rights anywhere in Defendant's Exhibit G, is there?**
**A. They're always incorporated in every lease.**
Q. I'm not asking you that. What I'm asking you is in this letter, Defendant's Exhibit G, you make no reference to any rights under the common law? A. These include rights under the common law. They're included in each lease. Q. If you could just listen carefully to my question. I'm not saying that they're not included in the lease. I'm just talking about

Defendant's Exhibit G, the letter you have in front of you. Now, correct me if I'm wrong, but I see no reference in this letter to any common law rights; is that correct? A. No. Q. Where is there a reference? A. It says, "If held over past the expiration of your lease, this is your written notice." Q. And then you go on to quote paragraph – it says, "Your written notice exercising the option under Paragraph 8-A of the lease." That's a reference to the written lease, is it not? A. That refers to the lease. Q. And then you go on to quote from Paragraph 8 of the lease, right? A. Right. I quote the Paragraph 8 of the lease. Q. As you sit here today, sir, you have no proof, no written proof, other than your testimony here that you actually delivered this notice, do you? A. No. Q. You had been an attorney by the time you wrote this notice approximately 20 years; is that correct? A. Yes. I believe if you do the math it is actually 19? Q. Whatever. You could have mailed this notice, could you not? A. Yes. Q. You could have sent it certified mail? Yes. Q. You could have sent it registered mail? A. Yes. Q. In either event you would agree that you would have a written receipt showing this letter had been received by the Morrells; is that true? A. Not necessarily. What could happen is that the letter would be refused or not picked up. Q. That's always a possibility, but you didn't get to that point, correct? A. No. Q. In addition to hand delivering the letter as you've testified, you did not, in fact, also mail a copy of the letter, did you? A. No. Q. In a way that would assure a receipt? A. No. Q. I take it from the exhibits that you turned over that you didn't prepare a written receipt that you could have had Mr. and Mrs. Morrell sign when you hand delivered the letter to them? A. No. Q. As I understand your testimony, in fact, you did not even deliver the letter to them. You did not hand it to them personally; is that correct? A. I did not hand it to them personally. Q. When you took the notice to their front door to deliver it to them, was it your intention to give it to them personally if they were at home? A. Yes. Q. Was it your intention to – let me strike that. Q. When you got to their house, as I understand it, their front door was open; is that correct? A. It wasn't opened. Q. Is there some sort of screen door or storm door and then a more formal wooden entry door? A. Yes. Q. As I understand it, the wooden entry door at least was not completely closed? A. Yes. Q. I take it the storm door, the screen door was closed? A. It was closed. Q. And you knocked on the door; is that correct? A. Yes. Q. And no one responded? A. That's right. Q. Since the door was opened, did you think that someone was home? A. I thought there was that possibility. Q. Did you look around in the yard to see if maybe Mr. and Mrs. Morrell were out in the yard working or something like that? A.

No. Q. Did you see the children in the yard playing? A. No. Q. Did you hear them? A. No. Q. Did you walk around the back of the house to see if they were gardening or something like that in the back of the house? A. No. Q. As I understand it, you opened the door and you called out. I take it no one answered the call? A. No one answered the call. Q. So as exactly as you can, can you tell us exactly where you I placed the letter? Did you place it on a table or did you placed it on the floor or some other place? A. As you come in, there's a wall. There's a ceramic floor. There's a wall on this side, and there's a closet on that side. And there's sort of an art display area and a wall that's not too far that opens into this atrium. And I put it next to the wall facing out. Q. You actually placed in on the floor? A. On the floor, yes. Q. And I take it you placed it face up with the label – with the name and address clearly visible? A. Clearly visible against the wall. Q. Were other things on the floor there?____ So anyone walking into that entry hall, that's naturally going to draw their attention? A. Yes. Q. You knew, of course, that the Morrells were in this house because of the fire in their principal residence, correct? A. Yes. Q. And that they were in the process of having their principal residence restored? A. Yes. When you delivered this letter, which is Defendant's Exhibit G you expecting to get a reaction from the Morrells? A. No

**Q. You weren't expecting them to respond in any way at all?**

**A. I was expecting them to pay the rent.**

Q. Did you not consider that they might be angry because you had renewed their lease for an entire year?

A. They knew that was a possibility under the lease, and so they should have expected it. Q. So you felt that they would simply accept their obligations and pay the rent? A. Exactly.

**Q. In any event whatever your expectations were, they did, in fact, respond to this letter according to your testimony; is that right? A. Right.**

Q. They didn't call you and attempt to negotiate with you over the terms of the renewal?

**A. No, they just paid the rent.** Q. And I take it from your testimony that you never in any way attempted to follow up with them to ensure that they did in fact receive the letter? A. I didn't. Q. Did you at that point, this is July 1st, 1991, have any belief about how long the Morrells were going to need to continue to occupy the rental property? A. I thought it might be for a substantial longer period. Q. And upon what did you place that conclusion? Or did you place that conclusion at the time? A. For one

thing, I was remodeling the house down the street, and he also had to have his lease extended and extended and extended because the work didn't progress as expected. Q. You're talking about the tenant that proceeded the Morrells in the rental property? A. Right. Q. Which would have been something less than a year before you delivered this July 1st notice; is that correct? A. Approximately six months, right. Q. Did you know the Morrell's telephone number at the rental property? A. I had it. I didn't memorize it. Q. But you had it available to you? A. I had it. Q. Did you telephone them to discuss their obligations under this extension? A. No. Q. I'm talking about at any time after the delivery of this letter? A. No. Q. Their house, and I believe we went over this earlier, is about 50 feet away from your principal residence. So you must have seen the Morrells coming and going as they pulled into the driveway or weeding or gardening or whatever they did in the yard there while they were at the rental property? A. Well, they had a crew that did the gardening. Q. But they were living in the rental property, correct? A. Yes. Q. And they did come and go? A. Yeah, I saw them come and go. Q. And they had four children, correct? A. They had four children. Q. And the children were playing in the yard, correct? A. Now and then, yes. Q. And they were supervised by an adult? A. Yes, they had several house people who would watch over the children. Q. When you saw the Morrells coming and going after the 1st of July 1991, after you had left this letter for them, did you call out to them just to make sure that they received this letter or call their attention to it? A. No. Q. And did they call out to you saying, "What are you doing? Why did you do this to us?" Or anything of that nature? A. No. Q. As I understand it, this July 1st letter, you never discussed that letter with your wife either, did you? Q. No, I didn't.

Q. Or with anyone else other than your attorneys in this action? A. Just the attorneys. Q. Let me make sure we've got the dates right. This letter was delivered on the 1st of July 1991; is that correct? A. Yes. Q. And the net rental payment under this extension would have been due approximately the middle of July; is that correct? Q. When the Morrells paid the rent the next month, did they enclose a note to you asking you to explain or justify the renewal of the lease? A. No. Q. Did they enclose anything with the rental payment acknowledging the renewal of the lease? A. No, they didn't. Q. I believe you said they normally brought the rental payment over to you. Did you accept that rental payment in July by hand delivery? A. They left it in the door. Q. At some point at least the Morrells came to you and told you they were moving out in the middle of August; is that correct? A. Yes.

Q. I believe it was Mrs. Morrell at some point who told you that they were going to be moving out around the 17th of August of 1991; is that true? A. Yes. Q. And that was a face-to-face conversation? A. Right. She was in the driveway. Q. Did she mention the renewal of the lease terms for the entire year? A. No. Q. Did you mention it? A. No. Q. She did, however, inquire about the return of the security deposit you were holding on the property; is that true? A. I think she did inquire about it. I don't recall exactly what was said.

**Q. Well, as I understand it, at that time, and this was sometime after the 1st of July of 1991 and sometime before August 17th, 1991, you believed that you had renewed the lease for an entire year; is that correct? A. Yes.**

Q. And under the terms of the written lease which were incorporated in this renewal, you were entitled to hold the security deposit until the termination of the lease; isn't that true? A. That would be correct. Did you mention this fact to Mrs. Morrell? No, I didn't. Q. As I understand it, sir, shortly after the Morrells moved out, Mr. Morrell – excuse me. Let me back up. You knew that the Morrells went on vacation immediately after vacating the property; is that correct? A. Yes, that was one of the things that Mrs. Morrell told me, that she was leaving for vacation. Q. And they went to a vacation property in Wisconsin I believe? A. Their vacation home in Wisconsin. Q. Now, a couple of days after the Morrells moved out, Mr. Morrell telephoned you from that vacation home, did he not? A. Yes, he did. Q. I believe you testified about that when Mr. Sandack was questioning you? A. Yes, that's right. Q. Mr. Morrell at that time essentially asked you if you had an opportunity to inspect the condition of the property since they moved out, did he not? A. I think he did. Q. And had you by that point? A. I'm not sure if I had or not. I probably looked through it. I may not have done any detailed analysis at that point. Q. You didn't tell him during the course of that conversation that you had discovered substantial property damage to the home, did you? A. I don't really recall the conversation with Mr. Morrell. Q. Well, ultimately, you made a claim of property damages for over $8,000 in this litigation; isn't that true?

**A. That's right. I remember talking to him about his kids driving up and down the corridor on their bicycles damaging the walls.**

Q. But you don't have any recollection of him speaking in a magnitude of damage of approximately $8,000; is that right? A. No, I don't. Q. Now, Mr. Morrell also asked you directly about the return of the security deposit did he not? A. I think he may have. Q. And in response I believe – just so

we're clear on the- this was actually a two-phone conversation on the same evening; isn't that true? A. It was a two-phone conversation. Q. And you had a conversation about an hour later. A. He called back to continue the discussion further; isn't that true? A. Right. And I'm not really able to distinguish much between the two. Q. I understand. So consider my questions here to being directed to these conversations as a group since it's understood that you can't establish what was said in one as opposed to the other. A. Thank you. Q. In those conversations Mr. Morrell did directly ask you for , the return of the security deposit or about the return of the security deposit, did he not? A. He may have asked about the return of the security deposit. Q. And as I understand it, you responded by telling him that you had filed bankruptcy; isn't that true? A. Yes.

Q. And when, approximately, did you file bankruptcy in relation to the date the Morrells moved out of the rental property? A. It was about the same day.

Q. And you told them after advising them of the bankruptcy filing that he would be receiving some formal written notification of that; is that true? **A. Right, Mr. Brustein sent it out. Q. Because you had scheduled Mr. Morrell as one of your creditors. A. I had scheduled him.**

Q. Because you were holding his security deposit? A. I scheduled him, yes. Q. And you did that even though at that point in time you did not owe him the return of the security deposit at least by your understanding? A. Yes. Q. In other words, the debt wasn't mature or the obligation wasn't mature? A. At that point, I didn't pay any attention. Q. And, in fact, even if you hadn't filed bankruptcy under your testimony here you wouldn't owe him the return of the security deposit until the earliest, June of 1992; isn't that true? A. That's not necessarily true. Q. That was certainly the terms of the written lease, was it. A. Yes. Q. So even though you could have given it back earlier, you were not legally obligated to return it until the lease term ended? A. If I rented it out before like the next month, at that point I would be obligated to return his deposit. Q. That's your understanding? A . That's my understanding. Q. Now, isn't it true that even if you rerent the property –hypothetically, if you rerented the property a month later – in fact, you did. We don't have to be hypothetical. You rerented the property in May of 1992. The Morrells are still liable to you for any shortfalls expiration of their lease, correct? A. Yes. Q. Because the new tenant is technically a subtenant of the Morrells; isn't that true? A. That may correct . I'm not really sure about that actually. Q. At the very least, the Morrells wouldn't have been liable to you until June of 1992 when their lease term

supposedly ended; isn't that correct? A. They may be correct. Q. In fact, you're making a claim here, as I understand it, in part because the new tenant who moved in in May of 1992 was only paying $2,000 a month; isn't that correct? A. Yes. There is a deficiency of $200. Q. So you're asking the Morrells to pay the $200 for each of the months remaining after you rerented the property? A. That's right.

**Q. When Mr. Morrell asked you about the security deposit, you advised him of the bankruptcy filing. You told him to deal with your bankruptcy attorneys, did you not? A. Yes, I did. Q. And you identified those attorneys, correct? A. I identified them.**

Q. But you didn't tell Mr. Morrell then that he owed you rent on the property for the month beginning August 18th, 1991, did you? A. I don't recall what I did. Q. Well, it is clear, is it not, that the Morrells – and the substance of your claim is that the Morrells didn't pay you rent after they left the property? A. That's right. They didn't. Q. So at the time you had this discussion with Mr. Morrell, the Morrells were delinquent in their rent; isn't that true? A. Yes, right. Q. At least according to your testimony here? A. Right. Q. But in the course of this conversation, you never told Mr. Morrell that he owed you rent? A. No, I don't think so. Q. And you didn't tell him that he wasn't entitled, under the terms of the lease, to the return of the security deposit until June of 1992, correct? A. No, I didn't tell him that either. Q. You told him to talk to your attorneys? A. I told him to talk to my attorneys. Q. You also told him that you wanted to inspect the property with him together, as I understand it, isn't that true? A. I think I talked about inspection, right. Q. When he returned from the vacation you wanted to walk through together; is that correct? A. Right. Q. Did you say anything, I'm talking about what you said, in the course of that conversation that clearly informed the Morrells that they were obligated to continue to pay you rent following their vacation of the property? A. No, I don't think – other than what I previously testified to. That's the extent of it.

**Q. Did the Morrells say anything to you that indicated that they understood their obligation to continue to pay the rent? A. Yes, that's what I understood from what they had said to me.**

**Q. If I understood your testimony on direct examination, you made a statement to Mr. Morrell that his lack of a response led you to conclude that he had understood his obligation? A. That's right.**

Q. I was talking about something different. Did he affirmatively state anything in the course of either of these conversations that led you to believe that he had understood his obligation to continue to pay you rent? A. Well,

that's kind of affirmative even though it's done by - Q. Did he orally say anything? A. He didn't orally say, "Oh, yes, I know I've got to pay each month, and I'm not going to pay and have a fight about it." Q. When the Morrells moved out on August 17th, 1991, you saw them moving out, correct? There was probably a big truck in the driveway for instance? A. I believe there was a rental furniture truck there or something like that, yes. Q. And at some point in the course of that day Mrs. Morrell, I believe, came over and dropped off the keys to the property; is that true ? A. No. I don't believe I got the keys, nor did I ever get the garage door openers back. Q. At some point Mrs. Morrell came over and told you though she was leaving? You testified to this conversation in the driveway. A. Yes, it took place in the driveway. Q. Now, at the time the Morrells moved out, had you placed the for rent sign in front of the property? As of the day they moved out, before they left but the day they were leaving, was the for rent sign up at any time before they left the property? A. I don't think so, no. A. Had you put an ad in the press advertising your ranch home for rent at any time before the Morrells left? A. No, I hadn't. Q. So you knew that the Morrells were going to owe you some rent because the property was certainly going to be vacated for some period of time while you got word into the press that you had property for rent? A. yes. Q. And yet you didn't say anything to Mrs. Morrell about her obligation to pay the rent? A. No, I didn't. Q. And when she asked about the security deposit you didn't indicate that the security deposit was going to be reduced by at least $2,200 because the property was vacant? A. No, I didn't. Q. As I understand it, you didn't ask Mrs. Morrell for the next month's rent either? A. No, I didn't. Q. And she didn't give it to you either? A. She didn't give it to me. Q. After the Morrells left, let's say the first week, you didn't get a rent check from them then, did you? A. I don't know. Q. Well, isn't it the substance of your claim, sir, that they didn't pay you rent after they left? A. That's right. But you were saying something about a particular time. I was confused. Q. At any time during the month of August? A. I didn't get any further rent after they moved out. Q. And you didn't get any rent in September either, did you? A. No. Q. Or October? A. No. Q. Or November? A. No. Q. Or December? A. No. Q. Now, by December, they're four months behind in their rent. They're over four months behind, aren't they? And that's almost $10,000, isn't it? A. Yes, it is. Q. Did you call them up and ask them to pay you the rent? A. No, I didn't. Q. You didn't pick up the phone? A. No, I didn't. Did you go to the house and ask them where the rent was? No, I didn't. Q. Well, we saw earlier Defendant's Exhibit G. That's a letter you

wrote renewing the lease. Did you write a letter like that saying, "You owe me $10, 000"? A. No. All they got was the bankruptcy schedules indicating liability. Q. I want to talk about that in a few minutes, but let's hold that for a moment. I'm talking about now direct communications with you to them. And also about this time, as I understand it, you were in bankruptcy, correct? A. Right. Q. You were having financial difficulties? A. Right. They didn't come in and do an interrogation of the debtor or me either. Q. I'm sorry, what was that in response to? A. To your question whether there was some sort of conversation between us about - Q. Then you misunderstood my question. I was talking about the efforts that you made to collect the debt that they owed you. A. I see, okay. Q. And you hadn't made any effort at all, as I understand your testimony? A. Well, the testimony is what it is. Q. And you were – we kind of got sidetracked here. I'm going to try and pick up where I left off. You were in bankruptcy at this time? A. Yes. Q. And you were having financial difficulties? A. I was. Q. And $10,000 would have been nice to have, wouldn't it? A. It wouldn't have gone anywhere towards the problem I had. Q. Well, let me put it another way. If you seen $10,000 sitting on the street corner somewhere waiting to be picked up, you would have bent down and picked it up, wouldn't you? A. Yes. Q. Whatever your other problems? A. Yes. Q. And I take it you didn't just drop into bankruptcy in the middle of August. You saw these financial troubles coming during 1991, did you not? A. For the circumstances of the bankruptcy, it occurred because of an unexpected turn of events. Q. Well that unexpected turn of events was a judgment rendered against you at the end of 1990, isn't that true? A. That's right. Q. Okay, so in July of 1991 you had this large judgment hanging over your head, isn't that true? A. There was an appeal pending, and there was a lot of things going on in the litigation. Q. There was an appeal pending in August of 1991, wasn't there? A. At some point – Q. There still is an appeal pending; isn't that true? A. There is no appeal pending. Q. Well, there certainly was an appeal pending in August of 1991; isn't that true? A. I'm not sure of that date. At some point the appeal wasn't pending any longer. Q. And was there an appeal pending in July of 1991? A. Yes, I believe so. Q. And you found time not with standing your financial problems in July to write them a letter renewing their lease for a year; isn't that correct? A. Yes.

Q. But you didn't find the time in October or November or December to send them a notice of past due rent; is that true? A. No, I didn't send them

notice of past due rent. Q. The purpose of renewing the lease for an entire year was to ensure that you would receive that rental income, wasn't it? A. Yes. Q. You took no effort to collect the rent that was due and owing? A. That's correct. I reported it to my attorneys. Q. Aside from that. By the 17th of September, that's one month after they moved out, you'd done an inspection of the property, had you not? A. I had done an inspection, right. Q. You'd done an inspection for physical damage to the property ? A. Yes. Q. But in addition to there being a security deposit securing you for the payment of this rental on this one year renewal, the security deposit was security for the physical damage during the terms of the Morrell's occupancy, correct? A. Yes. Q. As I understand it, you discovered substantial damage to the property chargeable to the Morrells in your mind; isn't that true? A. Yes. Q. And, ultimately, that was the claim in this lawsuit, correct? A. Yes. Q. And do you recall at this point how much money you demanded because of physical damage to the property when you filed this complaint? A. I believe it was about $8,000. That's my recollection. Q. Now, by my reckoning that exceeds the security deposit almost twofold; isn't that true?

A. That's correct. A. So in addition to this unpaid rent, these people had trashed your property in your mind; isn't that true? A. Yes. Q. And they were only in the property for eight months, correct? A. Yes. Q. When Dr. Boon rented the property, I believe you said he was your first tenant on the property?

A. Yes Q. He rented the property for a number of years, didn't he? Q. How much of a charge did you take against his security deposit when he left? A. I don't believe I took anything. Q. And you didn't take anything from the second tenant either, did you? A. I don't believe so. Q. And you made a special arrangement with Mr. Rittoff, the third tenant, the one that proceeded Mr. Morrell, but you at least didn't take any of the security deposit because of physical damage to the property, correct? A. Yes. Q. So as I understand it, you had this rental property rented out for over ten years by this time, correct? A. Yes. Q. And not once did you take any deduction from any other tenant's security deposit, right? A. Right. Q. And Mr. and Mrs. Morrell were there for a period of eight months and you demanded $8,000 from them for damages to the property, correct? A. Yes. Q. And you still didn't notify them of this though? A. No. Q. You didn't send them a letter?

A. No. You didn't call them? A. No. Q. Your wife, as I understand it, goes to the same church as Mrs. Morrell; is that true? A. Yes. Q. Did you ask

your wife to mention this to her? A. No. Q. Did you talk about the damages to the property at all with your wife? A. I may have mentioned it in passing. Q. Well, it was certainly a magnitude of damage out of all your past experience, beyond all your past experience; isn't that true? A. Well, of course. Q. So by the end of the year, 1991, The Morrells owed approximately $10,000 in rent by your reckoning, and another $8,000 because of damage to the property Let's skip ahead. Oh, I'm sorry. I skipped something. Let's backup. When you made this damage calculation you went through the property and inspected it, correct? A. Yes
Q. Mr. Morrell didn't go with you? A. No, he never came over. Q. And you never called him about it, did you? A. No, and he never called me either.
Q. I understand that. You didn't write him asking him when it would be convenient for him to go through the property? A. No. When you went through the property you took notes of what was wrong with the property; is the correct? A. I did Q. And you Ultimately disposed of those notes you took at the time you made the inspection, right? A. Yes. Q. And you disposed of them by the time of your deposition earlier this year; isn't that true? A. Yes. Q. Now, if we skip ahead a few months, it is let's say April, right after tax day. It's April 17th. The rent is due on your rental property. The Morrells still hadn't paid you any money, had they? A. All of those times when they didn't pay, I've acknowledged that repeatedly.
Q. The property was still vacant, was it not? A. The property was vacant until it was rented to Mr. and Mrs. Day. Q. And you were still in bankruptcy, correct? A. I was still in bankruptcy. Q. Now, you can calculate this out yourself, but by the middle of April, the rental amount that they owed you is approaching $20,000, isn't it? A. Yes. Q. And you still have this $8,000 in damages from their occupancy? A. Yes. Q. And you knew about that by April 15th too? A. Yeah. Q. That's almost $30,000, but you still didn't contact them about it; is that right? A. That's right.
Q. As far as you know by the 17th of April 1992, your attorneys hadn't contacted the Morrells about it either, had they? Again, you can only talk about as much as you know. Q. As far as you know they hadn't right?
**A. I informed my attorneys of it. They were wisely apprised of it. As far as I could see it was filed on the schedules, the bankruptcy schedules, and the notices had been sent out and they got the schedules. So as far as instituting this litigation, the attorney who did it, they thought it was best to do it.**
Q. Aside from instituting this litigation which was begun in September of 1992, over a year after the Morrells left, you made no efforts to collect the

debt that you claim the Morrells owed you, correct? A. Yes. I just informed my attorneys of the problem. Q. Other than filing this lawsuit as far as you know, your attorneys didn't make any effort to collect it either, correct? A. I don't know. Q. As far as you know then they didn't? A. I don't know. Q. Now, I'd like to talk about your bankruptcy filing. You're aware, sir, that the Morrells filed an objection to the confirmation of your bankruptcy plan, aren't you? A. Yes, I hear it was very detailed. I didn't expect that kind of objection from a $4,400 claim holdover. The detailed work looked like a legal mastermind. It was a very long, extensive documentation objecting to whatever it was, the plan. It stunned our attorneys, and everybody was really surprised that somebody – it looked like somebody had spent a great deal of money preparing it. Q. Well, aside from the money that had been spent preparing it, Mr. Morrell showed up at the confirmation hearing, did he not? A. Yes, that was a surprise too. Q. He personally appeared?
A. Yes, he did.
Q. Now, the substance of the Morrell's objection to your bankruptcy plan, do you recall that? A. No, but what I do recall was this very long, extensive, complex legal memorandum that quoted the law that I don't think anyone except a real expert in bankruptcy would understand. That's my understanding from Mr. Brustein. This was the work of a very brilliant person.
MR. KING: I had no part in preparing that document. This has not been marked as an exhibit, but it is part of the record in this case, your Honor. This is the Morrell's objection to the debtor's first amended plan of reorganization. Here's a copy for you and opposing Counsel.
BY MR. KING: Q. Mr. Morrell – Mr. Generes, I'd just like to show this to you and I'd like you to take a look at it and review it and see if it refreshes your recollection as to the substance of the Morrell's objection to your bankruptcy plan?
MR. KING: You've had a few minutes to review it. I'll pose the question to you again.
BY MR. KING: Q. What was the substance of their objection to your bankruptcy plan? A. I'm sorry, I don't understand this document. It's got to speak for itself. I can't summarize. Q. Let me refer you specifically to the second paragraph on the first page under the heading, "Introduction." It's about four lines long, and maybe you could read that. Not out loud, but to yourself. A. I'm sorry, the second paragraph? A. The second paragraph under the heading, "Introduction," on Page 1 of this document? What about it? Q. Well, as I understand it, sir, the Morrells were saying in this

brilliantly prepared legal document that you had scheduled their claim as disputed, but you had not told them the basis of the dispute. Isn't that the substance of what they're saying here, sir? A. That's what they say.
Q. And it was filed on August 17, 1992; is that true? A. Yes.
Q. So at least in the Morrell's mind, whatever filings you made in bankruptcy, you hadn't informed them of the substance of your holdover claims for example; isn't that right? A. Apparently they hadn't informed them or their attorneys. Q. You hadn't informed them of this $8,000 property damage claim?
THE COURT: Mr. King, I don't understand where we're going with this. The fact that the contend that they didn't understand it is of no relevance whatsoever to the issues in this adversary proceeding.
MR. KING: If you could allow me one more question, your Honor? I'm going to tie it up and move on.
BY MR. KING: Q. Isn't it true, sir, that when you scheduled the Morrell's claim in the bankruptcy as disputed, the schedule did not explain the substance of that dispute? The schedules -
THE COURT: Let me stop you. So what, Mr. King.
MR. KING: Well, your Honor, one of the basis of our case here is that this letter that Mr. Generes is moving on was never delivered, and that he never, in fact, had a valid -
THE COURT: Well, let's deal with the letter, not deal with the confirmation issues which don't have any bearing on the lease or issues raised by the adversary complaint.
MR. KING: Very good, your Honor.
BY MR. KING: Q. You met with Mr. Morrell at the hearing on confirmation to the plan, did you not? A. Yes. Q. You met with him and your attorney, Mr. Brustein, was with you. A. Right. Q. At that time Mr. Brustein advised Mr. Morrell that he would provide him with documentation for your disputed claim; is that true? A. I believe so.
Q. And he discussed the merits of the dispute that you had with Mr. Morrell? A. Yes, he mentioned the holdover tenancy listed on the schedules.
MR. SANDACK: Your Honor, I have to interpose an objection. This is all beyond the scope of direct. It's all, in my mind, irrelevant. I don't know what the point is other than apparently that was the first time the Morrells knew about this controversy. That can be done through their interrogation, not through the interrogation of this witness. I didn't go into it on direct. I think it's burdensome.

**THE COURT: Frankly, Mr. King, I don't know where we could possibly be going with this. He testified that he left the notice, and, apparently, your client is going to testify that they never received the notice. If they had received it, the fact that they didn't understand it would be irrelevant. The fact that they didn't receive it, the fact that they don't understand it at confirmation is irrelevant.** I just don't understand where we're going, what possible relevance this could have.
MR. KING: I've really completed this line of questioning. We think it's relevant because it's evidence, perhaps not conclusive, that they were never given such a letter or advised of the substance of the claim. But I am willing to go on. Perhaps we could have sort of a sidebar with the Court without approaching?
THE COURT: Yes, sir.
MR. KING: I want to go into an area now, your Honor, that clearly exceeds the scope of direct examination. And for purposes of the kind of resources and time, I'm willing to do it now if there is no objection from the plaintiff, or I can reserve this for my Case in Chief.
THE COURT: Let's do it now. MR. SANDACK: I have no objection, Judge. That's fine.
BY MR. KING: Q. Mr. Generes, you understand that my clients' intention is that you never in fact delivered this July 1st, 1991 letter; isn't that true? A. No, I think their contentions say that they didn't receive it. I think they said in the pleadings that they don't deny that I delivered it. Q. The $8,000 worth of damage claims that you brought against the Morrells when you brought this claim, you've dismissed those claims, haven't you? A. Yes, I did. Q. You dismissed them within the last two weeks; isn't that true? A. Yes, I did. Q. This is a copy of the residential lease. I believe you saw this earlier. It's Plaintiff's Exhibit l; isn't that correct? A. That's correct. Q. Now, as I understand it, sir, the damage claims that you originally made were brought under Paragraph 4 of the preprinted form leases, Page 1 of this document; isn't that true? A. Either that or common law. It's the same. Q. But in any event, your claim was the damage that occurred at the property was over and above the ordinary wear and tear; isn't that true? A. Yes. Q. And that these damages that you brought against them were brought because of their negligence or misuse of the property; is that true? A. Yes. Q. And in the course of making their inspection I take it you made an effort to distinguish between ordinary wear and tear and items of misuse; isn't that true? A. Yes. Q. One of the items you made a claim for, as I understand it -and I won't test your memory here. Let me show you Defendant's Exhibit

L. This was a document that's actually attached to the complaint that you filed in this proceeding and it still bears the sticker of Exhibit C.
MR. SANDACK: Your Honor, there's two objections I'd like to interpose at this time. First of all, Mr. King has acknowledged that the property damage claim has been dismissed with prejudice. Where the relevancy of this fits in concerning whether there's a holdover lease or a two-month extension, is wholly irrelevant. Two, I did object to this on the grounds of relevancy during my objections that I tendered to the Court to the exhibits. I just don't see where this has any bearing or helps the Court render a decision on whether holdover tenancy existed or didn't exist. In fact, it doesn't do anything. All it does is create new issues that are completely ancillary that we're not asking this Court to make a decision on.
MR. KING: May I respond, your Honor?
THE COURT: Yes, sir.
MR. KING: Notwithstanding the witness' understanding of our complaint or our answer to his complaint, it's our contention, your Honor, that this July 1st letter was a complete fabrication. We would like to go into the damage claims that were filed contemporaneously with the back-rent claim in an attempt to show a pattern of conduct of making extraordinary and baseless claims. Because that is exactly what we think the only remaining claim in this case is, and it's highly relevant to this witness' state of mind, this witness' intention in filing this adversary proceeding. And, in fact, the veracity of this witness in the claims that he's made against my client. It's our contention that these – the dismissal of these damage claims with prejudice on the eve of this trial was a thinly veiled attempt to, essentially, keep the Court from having this brought to its attention.
MR. SANDACK: Your Honor, if I may respond to that?
THE COURT: Yes, sir.
MR. SANDACK: I'm a little upset by that characterization. There was no intent by me or any member of my firm to thinly veil anything from this Court. I'm a little annoyed by that suggestion, and I don't think it's right. There's no basis for foundation for that comment. Secondly, your Honor, he's attempting to bring in character evidence which is completely irrelevant here. This isn't a showing of foundation or any habit. All it is is character evidence he's trying to bring in. It's not relevant. It doesn't help to support one bit in rendering a decision that this Court is being asked to render.
MR. KING: We believe this man committed a fraud against our clients and a fraud in front of this Court and that these
**THE COURT: This isn't an action of fraud against the debtor.**

MR. KING: We're not making a claim for damages of fraud, your Honor. That's our defense. It's our theory of the case that this is a completely and utterly fraudulent claim. If the Court indulges us, your Honor, there is a number of items listed on this exhibit, and I have no intention of going through every one. I simply want to deal with two items here. I believe I can do it quite expeditiously.
THE COURT: Which of the Federal Rules of evidence do you proffer this evidence?
MR. KING: Could we have a short recess while I look?
THE COURT: Yes. that's fine. We'll take a five minute.
MR. King: Your Honor, I call the Court's attention to three separate rules. Rule 608(b) permits inquiry of specific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility. I'm parsing out the applicable portions of the rule. "It may be allowed in the discretion of the Court in probative of truthfulness or untruthfulness. It can be inquired into on cross examination of the witness," which is where we are now. I refer also to the notes of the Advisory Commission of the rule which appears on the following page here. I'll read it all, the good and bad for us. "Effective cross examination demands that some allowance be made for going into matters of this kind," talking about non criminal but still questionable conduct. "The possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time." These instances that we're going into occurred less than a year ago, and we believe they're highly probative of truthfulness because the claims of damages that were made are so outlandish, they indicate a substantial overreaching. I think the evidence will definitely support that. I'd also call the Court's attention to Rule 405(b) which says, "In cases in which character or a trade of character of a person is an essential element of a charged claim or defense," which is what we have here, "proof may also be made in specific instances of that person's conduct," which, again, is exactly what we want to go into here, your Honor. And finally, I refer the Court to the textbook definition of relevant evidence in 401. It defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action, more probable or less probable than it would be without the evidence. What we want to show, your Honor, is that this man in filing his complaint, the complaint that contains the only charge left to be tried by this Court, not only, essentially, fabricated the charge that's remaining, but a

number of other charges that he has now seen fit to dismiss on the eve of the trial. This dismissal with prejudice, your Honor, did not occur months ago or years ago. It occurred less than two weeks ago. We believe it is highly probative of our theory of this case which is that the Morrells have been subject to an abuse of this court, not your Honor, obviously. But the plaintiff in filing this complaint has brought the power of the Court against the defendants in an effort, essentially, to extort some sort of settlement from them and retain money to which he is not entitled.
THE COURT: I'm going to overrule the objection and allow the testimony. But I caution you, let's keep this limited. We're not going to get involved in a meandering trip down a side street in this case and try a case that's not in front of us. I'm going to hold you very narrowly to a limited examination on these issues. We're not going to spend the rest of the day on this issue.
MR. KING: Thank you, your Honor. I'll try to be brief.
BY MR. KING: Q. Sir, Defendant's Exhibit L, which I just handed to you, this is the list that you prepared and that was attached to the adversary complaint that was filed in this action, correct? A. Yes.
Q. As I understand it, you wrote this list in September of 1992 from the notes that you had made when you inspected the property shortly after the Morrells had left; is that correct? A. Correct. Q. On Exhibit L you'll note that you're charging the Morrells $1,800 for one dead 16 foot fur tree due to failure to water. Do you see that, sir? In fact, isn't it true that you don't know why this tree died, do you? A. I believe it thrived for years and years and years. We had an extreme dry spell during August, and then it turned sheet white. It died from lack of water. Q. Again, sir, I didn't ask you about your belief. I'm asking you what you know as a fact? In fact, you never had the tree examined after it died, did you? A. No.
Q. You never had anyone who was a professional in these things because there was a failure to water, right? A. Right. Q. The Morrells lived in the property for eight months, correct? A. Yes. Q. Starting in December of 1990, right? A. Right. Q. So you're not suggesting that they should water this tree in December of 1990, are you? A. No. Q. In fact, you just mentioned an extreme dry spell in August, And we had – at that period of time the beginning of August was dry. Q. In fact, sir, isn't it true that the Morrells were only in the property for approximately two months during the summer of 1991? That's true, isn't it? A. Well, of course. Q. And your claim, without any further knowledge or expertise on this is the tree died because they didn't water it for those two months? A. That's right. Q. Now you were, as I understand it, living next door and occasionally went over

and turned the water on at the property; isn't that right? A. Occasionally. Q. Did you water this tree, sir?

A. No, I didn't. Q. You never advised the Morrells to water it either, did you? A. No, I didn't. Q. You don't even know for certain as you sit here today that the Morrells didn't water it, do you? A. No, I don't.

Q. So as I understand it from your testimony, you can't really be certain that the Morrells were responsible for the death of this tree, can you? A. I can't be totally certain, yes. Q. And yet based on the evidence that we've just talked about, you were willing to file a complaint against them charging them $1,800 for the death of this tree; is that true? A. That's not all of the evidence.

Q. Well, what other evidence do you have, sir? A. I talked to Chalet nursery. The man in the landscape division apprised me of what the cost to replace this tree was, and this is substantially less than what it would take to replace the tree. He said it is common for them to die from lack of water. And the other thing about it is to get in and out, because of the way that property is landscaped, it's going to be a very time consuming job for the people to go in and get it out. This price here is just the cost of the tree. And, actually, the cost, when you add all the labor to it, the price would be much more than $1,800.

MR. KING: Your Honor, I just have one more thing to do in this line of questioning about the tree and then I want to talk about one other item here. What I'd like to do is read from Mr. Generes' deposition on Page 57. If I can approach, I'll give you a copy, your Honor. I'm reading this as an admission, but not as an issue of impeachment. Page 57 Lines 10 through 14 – excuse me, 10 through 18. And, again, your Honor, not as impeachment, but as an admission. May I proceed?

THE COURT: Yes, sir.

BY MR. KING: Q. At your deposition, sir, you were under oath, were you not? A. Yes. Q. Just as you are here today? A. Right. Q. This is what you said at your deposition: "Question: You list here quite a substantial charge for the tree. How did you come to the conclusion that the Morrells were responsible for the death of this tree? Answer: It was alive before they came onto the property, and it was dead when they left." Question: And that is, basically, for whatever reason, you feel then that they are responsible for replacing it? Answer: Yes. " Q. That's the basis of your claim about the tree, sir, isn't it? That it was alive when they came, and it was dead when they left? A. In addition to what I said, yes.

Q. Now, if you'd look also at Exhibit L, Defendant's Exhibit L. The next to the last entry there is an entry for the replacement of a bath vent. It's almost a $500 entry, isn't it sir? Yes. As I understand it, you replaced this bath vent because the fan motor was noisy and wasn't drawing air properly out of the bathroom; isn't that correct? A. Yes. the time the Morrells left the property, wasn't it? A. Yes. Q. Now, at your deposition when I first asked you about this you said that you didn't have any reason to believe that the Morrells had abused the fan; isn't that true? Q. Let me read it to you. This is Page 69 of the deposition and beginning at Line 19 going to Page 70, Line 4. Oh, I'm sorry. I misread my notes here. It's Page 69 Line 19 to 21. At your deposition, sir, under oath you said as follows: "Question: Do you have any reason to believe that the Morrells had abused this vent or had caused this problem? Answer: No." That's the testimony you gave at your deposition. A. The record stands for itself. Q. You didn't correct the deposition, that testimony of your deposition, did you? A. No, I didn't. Q. After you had given that testimony we discussed Paragraph 4 of the lease form, which, I believe, is still in front of you. It's in your hand, is it not? A. Yes, it is. Q. That's the section that deals with the repair obligations of the tenant; is that correct? Not all of it. It's one of the sections. That's one of the sections? It's one of the sections. And in the terms of the lease – you don't have to testify to it, but it says, "Ordinary wear and tear items are accepted," isn't that true? A. Except for the lease rider of Paragraph 1 says, "Tenant shall return these specific items that are listed here in cleaning, normal working condition and will regularly maintain them properly." Q. When confronted with Paragraph 4 of the lease form, you changed your testimony at your deposition, sir. You said, did you not, that the Morrells had abused this bath fan; isn't that true? A. I think that I said based on the evidence that excessive moisture in causing the tiles on the tub wall to fall down. That they probably left the fan on an excessive amount of time. Q. In fact, after saying that you had no reason to think that they abused the fan, you testified as follows. And with the Court's indulgence, I'll read Page 71, Lines 7 through 18.

MR. SANDACK: Your Honor, I haven't objected to this. None of this stuff is impeaching. I mean, I don't know what the purpose of this is.

MR. KING: This is an admission of the party, your Honor.

MR. SANDACK: Judge, this whole line of interrogation discussed – Mr. King promised a pattern of fraud. "This is going to have probative value to the Court in the underlying claim that we're here to discuss and have a

judgment rendered on. This is doing nothing, your Honor. I just want the record to reflect a continued objection to this line of questioning.
**THE COURT:** Based on Mr. King's promise to keep it brief, I'm going to overrule the objection. This is not a hearing under Rule 11. If this were a hearing under Rule 11 in trying to show that there was no reasonable basis for making allegations, that's one thing. **But as I understand your defense it is that the debtor has engaged in a pattern of fraud. And from what I've heard so far, this falls far short of demonstrating fraud.** The mere fact that there's no reasonable basis for alleging something is very different from fraud, but go ahead.
MR. KING: I promise to be very brief. We're almost done here.
BY MR. KING: Q. At your deposition you said after having said you had no reason to believe that the Morrells had abused the fan, then you testified two pages later as follows: "Question: I want to understand that as best I can. Are you saying that you believe that this thing would not have worn out had the Morrells not lived there? That some other family who had taken better care of it, it would not have worn out? Answer: That's right. Question: And you're basing that on your considered opinion that the cause of this problem was that the fan was left on continuously? Answer: Yes, I think that's the analysis." In fact, sir, you don't know whether that fan was left on continuously while the Morrells were there, do you? A. I just explained that the tiles were falling out of the wall. They had to be falling out of the wall because there was a lot of water. Four kids must have been in there running the shower all the time causing this situation. That's my best conclusion from the evidence I can see. Q. Sir, don't ten year old fan motors wear out? A. Yes, they do. Q. Under normal wear? A. They could, yes, under normal wear. And, in fact, under the contract, if they wear out, they must return it in normal working condition under Paragraph 1 of the lease rider. Q. It's possible, is it not, that the Rittoffs abused this fan if in fact it was abused; isn't that true?
MR. SANDACK: Your Honor, I'm going to object. That's pure speculation. The Rittoffs are not in court here to deny they abused or didn't abuse the fan. Your Honor, this is going way beyond what Mr. King promised us.
MR. KING: Your Honor, this client's claim is pure speculation. That's what I'm trying to illustrate.
THE COURT: I'll overrule the objection. Let's move on.
BY MR. KING: Q. In fact, you don't know whether the Rittoff's abused this fan; isn't that true? A. When they moved in, they didn't state in this lease

that that fan wasn't functioning properly. And furthermore, the Rittoffs were just two people living there, a man and a wife. They were on vacation many parts of the year. So I don't believe that they abused the fan at all. Q. Sir, in fact, as you sit here, putting your beliefs aside, you have no evidence that the Morrells abused this fan, do you? I cited the lease that they signed off on. And it says here that everything was in good working order when they came in. Q. Sir, I'm asking you about an incidence of abuse, not about working order. As you sit here today, you have no evidence that the Morrells abused that fan, correct? This is evidence. Q. That is a lease, sir? A. Some evidence. Q. In fact, sir, reading from the deposition on Page 69, to read the basis upon which you rendered this charge against the Morrells. Beginning at Line 19 and concluding at Line 24. "Question: Do you have any reason to believe that the Morrells abused this fan or caused this problem? Answer: No. Question: Upon what basis do you charge them with its replacement then? Answer: It broke while they were there.

MR. KING: No further questions, your Honor.

MR. SANDACK: Just a few questions, your Honor.

**REDIRECT EXAMINATION**

**BY MR. SANDACK:**

Q. Do you recall Exhibit 2 that was entered into evidence? The letter, Plaintiff's Exhibit 2? A. Yes. Q. Did you deliver that letter on July 1 – at or around July 1 to the Morrell's house? A. Yes. Q. Did you put it on the floor? A. Yes. Q. Did you ever receive any written notification or oral notification from the Morrells that they wished to have their tenancy beyond. the expiration date of their lease? A. No.

MR. SANDACK: That's it, your Honor. I have nothing further.

THE COURT: Mr. King?

MR. SANDACK: Your Honor, I'd like to reserve the right to call any witnesses in rebuttal. But for purposes of my Case in Chief, I've concluded.

MR. KING: Your Honor, I'd like to call Jim Sodini to the stand.

**MR. JAMES G. SODINI, WITNESS, SWORN.**

**DIRECT EXAMINATION BY MR. KING:**

Q. Mr. Sodini, could you state your name and spell it for the record, please? A. James G. Sodini, S-o-d-i-n-i. Q. Sir, what is your occupation A. I'm a builder and remodeler. Q. And was that your occupation in 1991? Yes . Q. Did you have occasion in 1991 to meet Mr. and Mrs. Morrell.

A. Yes. Q. What was the circumstances in which you first met them? A. Well, the first time I ever talked to Patty Morrell, she called me and she said,

"Hi, I'm Patty Morrell, and in two years I want to reserve you to put a room addition on our house." About six months later I got a call in December, and she said –well, I just got a message on my machine. I just assumed they changed accelerated their program. Well, then I found out that their house burned as a result of the Christmas tree catching on fire. So I went there the next day, and that was actually the first time I had met them was the day after the fire.

Q. Did you at some point come to work for the Morrells? A. Actually, we probably had a very loose agreement in February or the very, very beginning of March. Q. And what were your duties under this agreement? A. It would be to help them restore the fire damage and to construct a new addition. Q. At the time you began working for the Morrells, were you advised of any target date for completing this construction, the remodeling, rebuilding? A. Well, actually, in the very beginning I'm not very quite sure if we spoke really specifically, but I think at one time he asked if we could be finished by June. And at the time I answered the question, we didn't even have plans. We went back and forth and talked about potential starting dates, and once we agreed that if we could get plans by let's say March, by the time we got the building permit, by the time we actually mobilized, under the most ideal situations, three months is just not enough for a job of that magnitude. Q. You were describing the conversations you had with the Morrells. Approximately when did those conversations take place as best you can remember?

**A. Well, we began I would have to say February. Because at one time I thought I wouldn't do the job only because I told them there must be some other people with more expertise in fire damage. But once they decided that they were going to do the room addition and expand the size of the house, that's when I became involved.**

Q. At some point in the spring of 1991 did you have occasion to talk to Mr. or Mrs. Morrell or both of them about the target date for the completion of the house? A. I'm sure I did, yeah. Q. And can you tell the Court the substance of the conversation? A. Well, I told them – if I remember correctly, I think they wanted to know if they could get in by June, and I told them no. No. 1, we had to got an occupancy permit. In order to get an occupancy permit you have to have, one, a working kitchen. we had the bathroom by the virtue of the fact that they were there all ready. But without a working kitchen, the Village of Northfield would never give us an occupancy permit. I don't remember exactly when, but we didn't even have the kitchen cabinets ordered at that time. I remember talking to Ed a couple

of times about what would be the possibility of – you know, how long, or if I have to extend my lease, you know, how long should I do it for. And I think I asked for – I asked for a couple of months. Q. And based on the schedule that you were working under in the spring of 1991, a two-month extension would take you approximately to what date on the calendar. A. I would say middle of August. Q. Is that what you advised the Morrells of in the spring of 1991? A. Oh, yeah. I mean. I just told them flat out that they couldn't move in in June.

MR. KING: No further questions, your Honor.

**CROSS EXAMINATION**
**BY MR. SANDACK:**

Q. Mr. Sodini, when was your first conversation with Mr. and Mrs. Morrell? A. The day after the fire. Q. Did they ask you the day after the fire how long it would take to get the work done? A. No, this was just – this was just, can you please come over and help us because we just had this terrible fire." Q. They wanted you to look at it and render an opinion? A. Right. Q. But they didn't ask you at that time how long it would take to get the work done? A. Oh, no. Q. It wasn't until February when they asked you to do the work and give them an estimate of how long it would take? A. We may have spoken in very, very, very general terms as to what it would take. But I don't think until probably – it could have been January or it may have been February, but I don't think we ever really talked about the magnitude of the job. Q. Until that time? A. Right. Q. And then at that time you had another conversation with one of the Morrells and they asked you again when did you think the completion of the work would be realized? A. I would have to say that we discussed it in probably late February or March. Q. And so late February or early March is when they said –when you said – I don't mean to put words in your mouth, so please tell me if I'm not being accurate. "June doesn't look good. We haven't ordered the cabinets yet. There's no way we're going to get a certificate of occupancy from the Village, so June isn't going to happen? A. Well, I don't think I ever qualified it about the kitchen at that particular time. I just said that I didn't think June was a realistic date. Q. And that was done in February or March? A. Oh, yeah, yeah. Q. Did you know where the Morrells were residing at when you were doing the construction? A. Only because at one time I think I had to go over and talk to them. Q. Did you ever see the written lease with the plaintiff? A. Oh, no, no. Q. Did you ever see a letter dated July 1 from Mr. Generes to the defendants? A. No.

Q. Did you ever do the room addition for the Morrells that they had contemplated doing way back in December before the fire? A. Oh, yeah. They literally rebuilt the entire house. Q. Oh, that was done at one time? A. Oh, yes.

**Q. How much were you compensated at that time? a Ballpark? A. $165,000, maybe. Q. $165,000 for all the work?**

MR. SANDACK: Thank you very much. I have no further questions, your Honor.

THE COURT: Redirect?

MR. KING: Just one question, your Honor.

**REDIRECT EXAMINATION**
**BY MR. KING:**

Q. Are you being paid to appear here today, sir? A. No.

MR. KING: No further questions.

THE COURT: Mr. Sandack?

MR. SANDACK: No, sir.

THE COURT: Thank you very much, Mr. Sodini. Can Mr. Sodini be excused?

MR. SANDACK: Yes, sir.

MR. KING: I'd like to call Ed Morrell to the stand.

**MR. EDWARD MORRELL, WITNESS, SWORN**
**DIRECT EXAMINATION BY MR. KING:**

Q. We have your name, Mr. Morrell. Could you spell it for the record? A. Edward Morrell, M-o-r-r-e-l-l. Q. And where do you reside, Mr. Morrell? A. 2324 Clover Lane. Q. And how long have you lived there? A. Seven years. I've owned the house for seven years. Q. I call your attention to December of 1990, what if anything occurred of significance in the Clover Lane house? A. We had a substantial fire in the house that caused us to move out for an extended period.

**Q. What caused the fire at your house? A. It was apparently a spark off a candle on the mantel set a wreath that was above it on fire and that started the living room on fire. Q. Were your children in any way involved in the cause of the fire? A. No.**

Q. And how many children did you have in 1990? A. Four. Q. And today? A. Four. Q. At some point, sir, did you enter into a lease with the plaintiff in this action? A. Yes, I did. Q. And for what piece of property was

that lease? A. For 1829 Happ Road. Q. And do you recall the duration of the lease? How long it was to last? A. Six months.
Q. And how did the term six months get reached? A. Well, Patty had made initial contact with Mr. Generes and explained our situation that we needed a short lease, a short term lease. I do not know who came up with the initial figure, but his suggestion or proposal was for an eight-month lease at $2,200 per month. I presented that to our insurance adjuster because under the policy they were going to reimburse me for my living expenses during the time that I was out of the house. The insurance adjuster said to me, "Do you think you could make it month-to-month or shorter like six months?" I said, "I don't really know, but I can find out." So I did that. I talked to Tasker, after we had gone in and seen the property, either on the phone or in person and said, "Could we make it six months?" And he said, "Would you be willing to pay more rent for that shorter period?" I said, "I don't think the insurance company will go along with that." He said, "Well, I'll tell you what, if you're willing to give me two months security deposit, I'd be willing to rent it to you for the $2,200 at six months under those terms." And I said, "That will be fine."
Q. And did you ultimately conclude the lease under those terms? A. Yes.
Q. And that lease was a written document, correct? A. Right.
Q. At the time you entered into this lease, had you received an opinion from anyone concerning the length of time it would take to rebuild your house on Clover Lane? A. I think we entered into the lease within three days or so of the fire occurring. The only advice I was taking on the terms of the lease at that time was from the insurance adjuster. I don't believe – I know that Jim had seen the house, and I don't think he had really rendered an opinion. He didn't render an opinion of how long it would take. I don't know if we had other fire restoration people out in that short time period. I don't think we did. Q. In any event you did - A. I think the house was still hot on the third day. I don't think we had gotten to that point. It was just listening to the insurance adjuster.
Q. At some point, in any event, you did enter into a six-month lease with the plaintiff? A. Yes.
Q. Calling your attention to the spring of 1991, did you come to have any discussions with anyone concerning the target date for the completion and restoration of your house on Clover Lane? A. Yes, we had settled in with Jim as our contractor on the project. I had been talking to him at some point in the spring about when it was he thought he could finish. Of course, we were zeroing in first on a start date, but then what I had been asking him on

occasion was how long from the point of starting that he thought he could finish.

Q. And in the spring of 1991, did Mr. Sodini give you an opinion as to how long it would take him for the construction work on your house? A. Yes. And what was his opinion? He thought it might be three to four months. Q. From the date of the compensation? A. From the date of the start, which was, I believe, the very first part of may. Q. Based on that discussion with Mr. Sodini, what if any conversations did you have with your insurance company who was adjusting the loss of the Clover Lane property?

A. Well, to that point we had been under a negotiation with the insurance company over how much the loss would cost to repair. We had several builders that had come in and put together detailed estimates. Because of the lack of commitment from the insurance company, we really couldn't move forward on the project because we were looking to complete several things in the house without knowing what they were going to be reimbursing us. It was really handcuffing our decision making.

Q. I'm not sure I completely understood the answer. Let me try a different way. As I understand it, you're saying in May of 1991, Mr. Sodini told you that he thought it would take approximately three months to rebuild the property?

MR. SANDACK: I'm going to object to the leading nature of the question.

MR. KING: I'm just laying it for

MR. SANDACK: Well, that would be fine if he asked what time frame because the question is preferenced in the spring of 1991. I didn't object because no foundation had been laid. I think now it's a good idea to get a time frame.

THE COURT: I'll sustain the objection.

BY MR. KING: **Q. When was the discussion with Mr. Sodini that you were talking about that you testified about a few moments ago?**

**A. It was, I believe, in March. It could have been early April. He had a vacation he was going to take, and we were finalizing the plans and negotiating with the insurance company all at the same time. But we started getting the idea that the original target date to get our house was not going to happen.**

Q. And what was the target date to get out of the Happ Road house?

A. The middle of June when the initial lease ran out. That's the commitment had with the insurance company. Q. After this discussion with Mr. Sodini, did you have further discussions with the insurance

company regarding the ability to vacate the Happ Road house by June 1991? A. Yes, I did, many. Q. And with whom did you discuss this? A. Mr. Steve Rapp, who was the adjuster on our account and also his supervisor, her name was Nancy Deprecenzo.(phonetic) Q. And what was the substance of these conversations? What did you say to them and what did they say to you? MR. SANDACK: Judge, I don't mean to interrupt. Can we get a time frame again so I can understand what's going on?
THE COURT: Yes, sir.
BY MR. KING: Q. Approximately when did these discussion with the insurance company occur? A. I guess they would have been in March. The reason is that was the time when we were really running into problems in terms of their commitment, and I was feeling that the whole project was getting pushed back. Q. And were these conversations in person or by telephone? A. By telephone. Q. And was this one conversation or a series of conversations? A. It was several. It was many. Q. Over what period of time did these conversations occur? A. Well, while we were trying to nail down the amount that the insurance company was going to reimburse us, I was reminding them every now and then that we were handcuffed. As we progressed over a few week's time period or maybe a four-week time period or maybe six weeks, I don't really recall, I was bringing that to their attention more because I knew that it was starting to really get in the way.
Q. What was the substance of your position that you presented to the insurance company with respect to the Happ Road property?
**A. Well, I told them that because of the lack of commitment from them, I couldn't commit to the scope of the job that I would perform. And as a result of that, it would not — the job was not going to be finished by the end of the six-month lease and I would need some additional time to reimburse living expenses, which was two months. And I asked for two months more.** Q. And when did you place that request to the insurance company? I would say it would be the April time frame. And what if any response did you ultimately get from this request to the insurance company?
MR. SANDACK: I'm going to object on hearsay grounds, your Honor.
THE COURT: Mr. King, what's your response to the objection?
MR. KING: Could I have a moment?
THE COURT: Yes, sir
MR. KING: We're not offering this to prove – we're offering this to prove what the insurance company told Mr. Morrell, not whether the insurance company did, in fact, reimburse him for these expenses.

THE COURT: Why isn't what the insurance company told him hearsay?
MR. KING: Because he was part of the conversation.
THE COURT: You're trying to get in the substance of what the insurance company told him. Now, if you're not trying to get it in to establish the truth of what they told him, I don't know why it's admissible.
MR. KING: Well, let me go about it a different way.
THE COURT: All right.
BY MR. KING: Q. Did the insurance company in fact pay you for an additional two-month's worth of living expenses at the Happ Road address?
A. Yes, they did.
Q. Did you have any written correspondence with the insurance company concerning the two month's of additional living expenses that you requested? A. Yes. Q. And what was the nature of that written correspondence, if you recall ? A. I had been unable to get a verbal response to a couple of phone inquiries. It was difficult to get a hold of them. So I faxed a letter that contained a lot of information on it and which also contained a paragraph that asked specifically for some additional time, two month's of time in the house, reimbursement for that rent. Q. Let me show you what's been previously marked as Defendant's Exhibit E for identification. I'd like you to take a look at it and tell me if you recognize it?
A. Yes.
Q. Can you identify Defendant's Exhibit E for the record?
A. It's a fax that I put together and faxed myself to Nancy dePrecenzo, the supervisor on my account in the loss.
**Q. Did you write this document yourself? A. Yes. And did you write it on or about the date it bears, March 9, 1991? A. Yes, I did.**
Q. What is the significance of Autotype, which appears at the top of the second page of this exhibit? A. That's the company that I work for.
Q. Did you send this from your place of business?
A. Yes, I did. Q. Is this the communication you were talking about where you asked for some consideration of the payment for additional living expenses? A. Yes. Q. And could you identify for the Court the paragraph you were referring to? A. It's the bottom paragraph of the first page. Do you want me to read it? Q. **At this point, this is -- no, you don't have to read it. It's in the record At this point, March 19, 1991, had you settled on the desire for a two-month living expense reimbursement?**
**A. No, it came latter .**
MR. KING: Your Honor, I move to admit Defendant's Exhibit E.
MR. SANDACK: I have no objection.

THE COURT: It will be admitted. (Defendant's Exhibit E was admitted.)
BY MR. KING: Q. At some point in the spring of 1991, did you have a conversation with the plaintiff in this case, Mr. concerning the extension of the Happ Road lease? A. Yes, I did.
MR. SANDACK: Your Honor, again, I hate to interject, but can we just get a month?
MR. KING: I'm going to get to it
BY MR. KING: Q. Approximately when did this conversation occur? A. I'd say it was the end of April beginning of May.
Q. And was this a conversation that occurred personally or by telephone?
A. By telephone. Q. And where were you at the time?
A. In my office at Autotype. Q. Who placed the call? A. I did.
Q. And where did you place the call to?
A. To Tasker's home of – I assume his home office. When we signed the lease we were in what appeared to be an office area of his home. I believe the phone number he gave me rang in his home. Q. And in the course of this phone conversation, what did you say to the plaintiff and what did he say to you? A. I told him that it did not look like the house was going to be finished, my construction project would not be finished by the mid-June time frame, that was the end of the lease, and I asked him if we'd be able to stay for two more months. He said that was not a problem. I could do whatever I wanted to and that would be no problem at all. He made some kind of reference like, "Well, you've never rented from me before, but stay as long as you would like." And I said, "Well, I'd like to stay for two more months. And he said, "Well, whatever you'd like is okay." And I reaffirmed the two-month time frame again because he kept – I mean the way he was talking it was like, sure, it's no problem. But I wanted him to know that two months was what I needed, what I got committed from the insurance company, and what I could afford commitment from my builder that I would be in that house in August. Q. In the course of this discussion, did you discuss the rental rate that would apply during to the two months?
A. **Yes, over the course of staying in the house I really came to the conclusion that we were over paying.** So I was hoping that maybe we could reduce the rent by a little bit. I said to him, you know, "What about the rent?" And he said, "Well, we won't increase it. We'll just leave it where it is." And I sort of gave up mentally on the idea of negotiating. I just didn't think it was worth doing. I just accepted the 2,200.
Q. At the time you had this telephone conversation with the plaintiff, had you received a commitment from your insurance company to pay for two

additional months of living expenses? A. I'm almost certain that I had. I **mean, I guess I'd have a little bit of a problem saying absolutely for sure.** The way it tracks back through the papers I have, I believe I had that commitment.

Q. Did you receive any correspondence from the plaintiff on or about the first of July of 1991? A. No. Q. Let me show you what's previously been marked as Defendant's Exhibit G. Will you take a look at it and tell me the first time you recall seeing that document? A. The first time I saw a copy of this was when I had received papers on the action against me that we're discussing today. Q. Did the plaintiff at any time prior to the filing of this complaint advise you or suggest to you that the lease on the rental property had been extended for one year as contemplated on Defendant's Exhibit G? A. Absolutely not. I would have been in no position to accept that kind of directive or proposal. What do you mean by that? Well, we knew we would be out of the house in two months, and we were really scrapping the bottom in terms of our financial situation. We were putting on an addition to the house, and we were constantly in a debate mode with the insurance company attempting to have them keep up the inflow of money with the outflow of money. With insurance reimbursement in fixing a home, the money does not come from the insurance company to the homeowner. It goes from the insurance company in stages as completion levels come about to the mortgage holder. When the mortgage holder decides that the completion levels are at their satisfaction, then they reimburse the homeowner in chunks so they're covered in case the homeowners decided to abscond the money and not do any repairs and they're left with a property that's worthless. Q. To the extent of your knowledge did – well, when did you leave the Happ Road rental property? A. It was – we actually moved out most of our furniture and belongings, I believe, it was early in the second week of August. Patty had put together a commitment from a moving company that came in and moved everything out. They left a few things so that Patty and the kids could adequately sleep there for a couple more days, and then they went on vacation up to our cottage. Q. In or around August of 1991, did you have occasion to discuss your security deposit with the plaintiff?

A. I did. I called him from our Green Lake cottage after we were completely vacated from the premises to find out where my security deposit was. We had attempted to leave the premises in very good condition, and we had somebody picking up our mail and it hadn't come yet and I was wondering where it was. I also wanted to make sure that Tasker had had a

chance to go into the house and see that there was no problems. Q. In the course of this conversation, what if any response did the plaintiff give to your inquiries? A. Well, while we were on the phone I asked him if everything was okay, and he had said that it pretty much looked okay. He mentioned that there was a little bit of damage to one of the walls which he figured a painter could fix, but he wasn't sure would be referencing that maybe one of the kids hit it with a tricycle or something like that. I said, "So everything else was okay? There wasn't any other problems?" He said, "No." Without me directly saying where is my security deposit, he said, "Oh, are you referring to the security deposit? Is that what you're asking me about?" I said, "Yes. I would like to know about that." And he said, "Well, didn't you get the paper work on my bankruptcy?" I said, "No, I don't know anything about that." He said, "Well, I filed bankruptcy and you should have gotten that paper work." He mentioned that he sent it to Happ Road. And I said, "Well, that's probably why I haven't gotten it then. What does that mean?" And he said, "Well, it's not going to be a problem for you because I've got enough money." But this situation with whatever judgment that was found against him, he had to do some reorganization, but it would just be a matter of a few months and then I would get my security deposit. Q. Did the plaintiff at any time indicate that your tenancy on the property had been held over and extended for a year? Absolutely not. Did the plaintiff at any time in that conversation indicate that the property had suffered substantial physical damage?

A. No, just what I mentioned was the only thing. Oh, I'm sorry. He also mentioned that he saw that I had replaced a couple of tiles in the bathroom, and I acknowledged that **because I felt bad that these tiles -- there was a couple of tiles that had fallen and I replaced them.**

**Q. Did you have any further conversations with the plaintiff concerning your security deposit through the spring of 1992? A. No, I didn't. I said, "Should I be talking to your attorneys?" And he said, "Yes." He gave me the name.** From that point, I had regular correspondence, conversations with his attorneys, one of his attorneys, on the status of the case and the time when I would be reimbursed for my security deposit.

Q. Did you keep in contact with the plaintiff's attorneys on this matter? A. Yes. Q. And how often did you contact them? A. Well, it probably averaged once a month. There were times when I called and then called back a week later. There were other times when 45 or 60 days might have gone by, but it probably averaged monthly. I was very frustrated because I

wasn't getting any information from them on what it was – what the problem was. **And I noticed that in the filing – or in the plans and filings that pertain to the bankruptcy, that there was this disputed or protested designation next to the $4,400 claim.** I didn't understand that so I kept calling and asking them, "What is the disputed amount? I'd like to understand that. Is it $100, is it $200?" Could I know so that at least I'd have an idea of what would be coming my way and what the timing length was. Q. When was the first time you became aware of the nature of the dispute over the claim for the return of your security deposit? A. When I filed the motion in this court that was referred to earlier. I had a very brief meeting with Tasker and one of his attorney, Abe Brustein. I think that was his name. Q. Now during the time that you were at the Happ Road rental, the eight months that you were there, did you or your family do $8,000 worth of damage to the property. A. No, we didn't do any damage to the property. I mean, not anything that was abnormal for a relatively conservative family with four children. **I mean, children are not perfect, but ours are no more wild than the next person's.** As a matter of fact, I took a lot of care to trying to make sure the property was in the same condition when we left. I mean, there were things like – a prime example is that there was a cover on the toilet in one of the bathrooms. It cracked. I don't know how that happened, but we ended up buying one. **Patty spent hours – she went out and bought a brand new toilet that was exactly the same and had to throw the toilet away just to get the cover because they wouldn't sell us the cover alone. It cost us something like $100. We just did it.** The tile fell off, and I figured I didn't know what caused it, but I figured it was just going to cause Tasker a headache, so I put the tile up. It was my nature. There was a door that was broken – there was a closet door that was broken and it was acknowledged as broken when we signed the lease. One night I got motivated and decided to just glue this thing and clamp it. It's going to be okay. And that. As a matter of fact, I mentioned it to him and he thanked me. There may have been one or two other things. We replaced anything that broke. There was nothing wrong with that property when we left.

MR. KING: No further questions, your Honor.

THE COURT: Mr. Sandack?

**CROSS EXAMINATION**
**BY MR. SANDACK:**

Q. Mr. Morrell, my name is Ron Sandack. If I ask you a question that you don't understand or you need repeated, please let me know. As I understand it, in December of 1990, you had an accident in your house which caused you to enter into a lease with Mr. Generes, right? A. Yes. Q. Did you ever tell Mr. Generes that one of your children caused the accident, had caused the fire to engulf your house? A. No. Q. In December of 1990, I take it you were looking at more than just the plaintiff's property as a possible renting situation until your home was fixed? A. Yes. Q. Did you look at more than one lease before you signed Plaintiff's Exhibit 1?

A. More than one lease? The only lease or leases that I looked at came from Tasker. I didn't examine any other potential leases or other properties. We weren't interested in any of the other properties that we saw. I don't recall whether there was actually a lease put together with the original eight month $2,200 proposal or that was just done verbally.

**Q. Okay. When you received the unsigned version of the lease and Mr. Generes said, "This is something we'd like to discuss," did you take it and consult with an attorney before entering into that lease? A. Yes, I did.**

**Q. You had an attorney look it over? A . Yes.**

**Q. Why did you do that? A. Well, it was like a $2,200 commitment, and we also had a substantial level of rider items listed. I just wanted to make sure that I wasn't doing something that I didn't technically understand.**

Q. Well, I'll ask you a question about the rider in a minute. But essentially, wasn't it true that before you signed into a legal contract with Mr. Generes, you wanted to make sure that you were protected? There wasn't anything in there that was onerous. This was rather a standard form and that you were being protected by signing that. Isn't that why you saw attorney?

Q. And you were protecting yourself and your family? A. Yeah, the insurance company was not going to take any responsibility for the terms of the lease. They were simply going to reimburse the monthly cost. The responsibility of the lease was with me.

**Q. As far as the rider goes, did you make any revisions to the rider Any requested changes on that document? A. You know, I really don't remember. I know that Tasker testified earlier about the dog. I remember that he did put that onto the rider and it said that we had a small dog and that there were no other pets allowed but that one was.**

**Q. Well, that was at your request? He didn't know you had a dog, right? A. Well, it could have been Patty. I don't know. Q. Well,**

either you or your wife said, "We have a dog and the lease provides for no animals. Can we put in an exception for our poodle?" A. That's correct.

Q. Okay. In February of 1991, was there a problem with the garage door at the Happ rental property? A. Yes.

Q. Did the door come out of the track, one of the rollers come off. A. Yeah, it wouldn't operate. It fell off on one side.

Q. And you got it repaired, didn't you? A. Yes.

Q. You paid about $194, didn't you, to get it fixed? Q. And you felt that was Mr. Generes' responsibility under the lease, didn't you? A. I did.

Q. And you were so staunch in your opinion that you typed up a letter and dropped it off to him saying, "Hey, you should pay this, not me," in sum and substance, correct?

A. I believe that Patty had mentioned it to him, and he made reference to the garage door opener being our responsibility. I didn't understand that, and I read through the lease and it stated that the garage door opener was on the rider. But the problem was not the garage door opener. It was the garage door. So I figured I'd put a note together. I don't write very well, so I typed it on the computer and I dropped it by Tasker.

Q. The bottom line, Mr. Morrell, you typed up a letter and dropped it off with him saying, "You should pay for this, not me," Correct? A. I asked him for consideration on it because I didn't feel it was our responsibility.

Q. But it was so important to you that you typed up a letter, right?

A. It was worth typing a letter.

Q. Okay. But in February or March or May or April or whatever month it is that you supposedly had a telephone conversation with Mr. Generes about an oral extension to the lease, it wasn't important enough for you to type up a letter saying, "Dear Tasker, this letter will confirm our telephone conversation"? You didn't do that, did you?

A. I wish I had.

Q. You didn't though, did you?

MR. KING: Objection, your Honor, argumentative.

THE COURT: Overruled.

THE WITNESS: I did not write any letter.

BY MR. SANDACK:

Q. Did you consult with an attorney at this important juncture and say, "I want to extend my lease. What do you think?" A. No.

**Q. You didn't consult with an attorney, you didn't write a confirming memo or letter on your supposed conversation in the spring, some month of 1991, about an extension of your lease, correct?**

**A. That's correct.**

Q. So how did you make payments of monthly rent from December through August? A. My wife pays the bills. They were by check.

Q. But you dropped them off, right? You didn't stick them in the mail?

A. I don't know that. Q. You don't know that? A. I have absolutely no idea. My wife takes care of the bills. Q. She didn't tell you? A. She never said how she was delivering these payments? If she did, I don't recollect it. I mean, she might have. A. In July of 1991, other than you and your wife you have four children at home, correct? A. Yes, sir.

Q. You had two employees at the house during the summer of 1991, a housekeeper and a cleaner or a cleaning lady? A. We had a cleaning service that Patty had employed that sent in somebody, I think, once a week. Q. How many days a week did you have someone besides your wife and children at your home? Pretty much I would say five to six. Q. Out of seven? A. Right. Q. So on July 1, there were at least five people in the house, right? A. On July 1, there were five people in the house? Q. At least we know that. A. There is no way I can confirm or dispute that. I mean they could have been off on an outing all day long. They could have been in the house. Some could have been there. Some could have I don't know.

Q. **But when you left the house and your family left the house, you didn't leave the door unlocked or unopened, did you? That wasn't a practice of yours, was it?**

**A. We didn't routinely use the front door of the house. Generally, we used the garage entrance, but it's not impossible. I mean, the kids could have taken a walk down the block --And what, left the door opened? It's possible.**

MR. SANDACK: Your Honor, I have no further questions of this witness.

THE COURT: Mr. King?

MR. KING: Just a couple of very quick questions, your Honor.

**REDIRECT EXAMINATION**

**BY MR. KING:**

Q. You testified concerning a phone conversation with the plaintiff regarding the extended lease at the Happ Road property? A. Yes. Q. In the course of that conversation did the plaintiff agree to extend the lease on the property? A. Yes, he did. He said that I could stay two more months and

continue to pay the $2,200. You know, around about that time I had a lot of concern whether or not we were going to be able to stay because I had a family to worry about in the house, and I needed to get a commitment as to where we were going to live. If Tasker was going to be unwilling to commit two more months, I would have had to make alternative plans, which would have been to rent something else or live with relatives for a couple of months. But I had to be sure. I couldn't afford to have my family hanging and all of a sudden – We don't rent property as a routine. What I did understand is that my lease expired on mid-June, at mid-June, and if Tasker was on top of things he might have been looking for me to get out. He was contemplating selling the house. **He had put a for sale sign up. I knew he was under financial pressure, so I needed to make sure that I had a commitment with him and he gave it to me.**

Q. How did you know he was under financial pressure? A. He told me.

MR. KING: No further questions, your Honor.

MR. SANDACK: I just have one further question.

**RECROSS EXAMINATION**
**BY MR. SANDACK:**

Q. I'm going to use your words. You said you had to be sure that you were going to get this extension. You couldn't afford to leave your family hanging and you needed a commitment out of Tasker for a two-month extension. Those are your words, correct? A. Correct. Q. But you didn't write a letter? You didn't write a note? You didn't follow up in any way, shape, or form in writing to get your commitment to memorialize your agreement at all, did you? A. No.

MR. SANDACK: No further questions, thank you.

MR. KING: My last witness, your Honor, is Mrs. Morrell.

**DIRECT - MRS. MORRELL:**
**BY MR. KING**

Q. Could you spell your name for the _ A. Patricia Anne with an E, A-n-n-e, Morrell, M-o-r-r-e-l-l.

**Q. Calling your attention to December of 1990, did your principal residence suffer damage by fire? A. Yes, it did.**

**Q. And what caused that fire? A. I actually was in the room when it started. A candle flick started a wreath on fire and the tree caught right away.**

Q. Did your house suffer substantial damage as a result of this fire? A. Yes, it did. I was having a party for the children, so I had seven children and a baby upstairs asleep and my husband had gone out with another one of our children. So I got the kids all out of the house, and by the time that happened, the house was ravaged with fire. We actually, the baby and I, walked through flames to get out of the house. Q. After your principal residence was damaged by fire, did you at some time after that come to meet the plaintiff in this case, Mr. Generes? A. Yes. Although, I had met his wife at church before and knew her Q. What was the circumstances in which you met Mr. Generes in December of 1990? A. Well, I had gone up and down Happ Road to get back to my house. It was a road that I used a lot. I seen the for rent sign, and I wrote that number down. At the same time a lady from the church came and said, "Dorothy's house is for rent. Here's the number, call." And Ed had circled all the possible rentals that looked good and, you know, it was the same. We had three numbers that were all the same. So we called him along with several other people. Q. You made a reference to Dorothy. To who do you refer? A. Dorothy is Tasker's wife. Q. During the course of your meetings with the plaintiff in December of 1990, did you have occasion to tell him what caused the fire at your home? A. No. I think I said there was a fire. I don't know if I said anything other than that. Q. At some point in December of 1990, did you or your husband enter into a written lease to rent the Happ Road house from the plaintiff? A. Yes, we did. Q. What was the duration of the tenancy in that written lease that you had executed? A. It went from mid-December – I don't know the exact date –to mid-June. I don't know the exact dates. Q. At some point between mid-December and mid-June, mid-December of 1990, mid-June of 1991, did you come to a conclusion about whether you wanted to leave the Happ Road rental property at the end of the lease term? A. I was very nervous. We had been through a lot emotionally. I was very concerned about where we were going to stay. We were constantly, you know asking our builder – trying to figure out where we were going to go, if we were going to be able to get in in June, what was going to happen. Dorothy had come over and said that they were having trouble, financial trouble. She didn't know what was going to happen The house was for sale and a couple of people had come through. I was concerned that the house was going to be – you know, I blew it out of proportion. I thought the house would be sold and we would be somehow out on the street. So we really started pursuing our insurance company and they did in fact okay the two extra months. And I called Tasker eventually and just said, you know — Q.

Excuse me. Before you get into that, you started to describe a phone conversation with the plaintiff? A. Yes. Q. When did that phone conversation take place? A. I believe that was either in late April or early May. I'm not sure of the time exactly. It might have been May. Q. Where were you? A. I was in the bedroom on the Happ Road rental house on the telephone. Q. And who placed the call? A. I did, Q. And to what location did you call to reach the plaintiff? A. The number that I had – that my husband had given me – he frequently called Tasker and that, I believe, connected to his home next door. Q. Your husband testified to a phone conversation in that same general time frame. In relation to your husband's conversation what was your conversation with the plaintiff? A. Mine was initial. And then I called him at work and I said, - – . "You need to follow up." And I was very adamant about it. I had hoped it was that day. Q. Who did you call at work to follow up on? A. My husband. Q. So your conversation occurred before your husband's? A. Right. I didn't discuss money or specifics. I just wanted to see if it was possible. Q. In the course of this telephone conversation, what did you say to the plaintiff and what did the plaintiff say in response to you? A. I said it looks like, you know, we may need a month or two, probably two, and would it be possible for us to stay. And he said, "Sure." I said that I'd have Ed call him. " **We just want to make sure we- have-the verification from the insurance company, but he'll call and discuss it with you.** And he said that would be fine. Q. How did you come to determine that you needed or wanted to stay an additional two months at the property at that time? A. Because I knew I was leaving for the lake, and I think it would have been an easier transition for the kids. I was just thinking of the kids. It thought it would be an easy transition for them to go right on vacation, and, you know, not have to move once or twice or in with relatives or in with friends or maybe even split us up. You know, I just didn't know. There was a lot going on at the time too with the insurance company and paper work. Q. At or about the time that you had this phone conversation with the plaintiff, did you have reason to believe that your Clover Lane property, your principal residence, was going to be ready for occupancy in the middle of August of 1991? A. My builder said that he would have it ready for us when we came home from vacation. Q. And when were you scheduled to come home from vacation? A. The third week in August because my children started school the following week. Q. Did you at any time receive any written correspondence from the plaintiff in or about July of 1991 concerning an extension of your lease term for a one-year period? A. No, I did not. Q. You heard the plaintiff's

testimony of how he allegedly delivered this notice to the Happ Road rental property, correct? A. Yes. Q. Had the plaintiff delivered the letter in the manner he stated, would you have seen that letter?
MR. SANDACK: I'm going to object. That's pure speculation.
THE COURT: Sustained.
BY MR. KING: Q. Did you in fact see a letter in the front entrance of your house on or about the lst of July 1991? A. No, I didn't. Q. You had people who worked for you at the house, a housekeeper and a cleaning lady; is that true? A. Yes, it is. I was at the other house working part of the time, going back and forth. And, also, I did all my work in the – when you first walked in the house it was like – I don't know what it was. It was like a living room, dining room type of thing and I had all my work there. **And, in fact, many people dropped things off and put it on the desk.** My children knew they were not allowed to disturb that area at all. I had a housekeeper and at one time a summer girl that just helped the kids play and keep busy so the house wouldn't be taken over by the children. Q. Did either of those two people who worked for you ever indicate to you that they'd seen a letter delivered like the one that the plaintiff testified about?
MR. SANDACK: Objection. That's, again, pure hearsay.
THE COURT: I'll overrule the objection.
THE WITNESS: No, not to deliver a letter. He had come in a couple of times showing people the house, and they did tell me about that. And then the washing machine had broken and he was trying to fix it and make arrangements for that. I told them who he was and, you know, to let him in and ascertain whatever information he needed.
BY MR. KING: Q. Just for the purpose of clarity, the he you were referring to is? A. Tasker Generes, yes. Q. Did you ever have any conversation either personally or by telephone in which the plaintiff indicated to you that the lease the property had been extended for a year? A. No, I did not. Q. Did you ever have any phone conversation or person-to-person conversation which the plaintiff indicated to you that you owed rent on the property for any period after you left the property? A. No. Q. When did you ultimately leave the Happ Road rental property? A. I made arrangements to move the bulk of our belongings out to my Clover Lane address early in August, I don't know the exact date, with a local moving company. And I just left a few things behind that I knew I would use going to the lake so I could live in the house a day or two before we left. Q. On or about that time did you have occasion to have any conversations with the plaintiff regarding the Happ Road rental property? A. As I was leaving – I had the kids in the car

and I did give him the key and the garage door opener and said that we were leaving and that I had the house clean. Ed was going to move -- there was a mattress left, and he'd be moving that out that evening or the next morning and he would talk to him about the specifics. I said, "Did you see anything wrong with the house in regards to the security deposit?" And he said, "No. There might be a little dent in the wall and **the tree looked a little dry**," but other than that, that was it. He said, "I'll mail you the security deposit." Q. Now, did you have any earlier conversations with the plaintiff? Person-to-person conversations after that? A. In September after we came home from vacation, some wallpaper had been sent. My decorator had my old address and they sent the wallpaper to that address. I called him and asked him if he did in fact have the wallpaper. He said that yes, he did. He was at 1829. He was in the house, and I said, "Thank you very much for keeping that for me. And he handed it to me and said good bye. Q. In the course of that interchange in September of 1991, did the plaintiff at any time mention that you were delinquent in rent? A. No. Q. Did the plaintiff at any time mention any sort of obligation in that conversation to pay rent? A. No. He was very nice to me and handed me my wallpaper. Q. Did the plaintiff at any time in that conversation mention any substantial damage that he felt you caused to the property? A. No. Q. After you left the Happ Road rental property, to your personal knowledge, did your husband have conversations with Mr. Generes? A. Yes, he did. I'm not sure about the exact date, but I know that he said he was going to call. You know, we were trying to figure out how the money was going to go and what the insurance company had promised and whatever it was and all the walk throughs that had to be done in order for the mortgage company to release our money. I was a little pushy about it and I wanted him to call and find out so we could plan better. And I was in the room with him when he called the first time, but not the second time. When you were in the room, did you hear your husband's part of the conversation? Yes, I did. Can you account for the Court what your husband said?

MR. SANDACK: I'll object, your Honor. His side of the story has been echoed. This is just piling on.

THE COURT: I'll overrule the objection.

MR. KING: You may answer the question.

THE WITNESS: To the best of my knowledge, I remember him asking in general terms about the condition of the house, if it looked good to him. And then they were talking about a drywall patch. He was going back and forth about the cost, and he decided he didn't really know what it would cost

but to let him know. But did everything look okay to him? And finally he said to him something like, "Yes, I will bring the security deposit." And then my husband's whole face changed. And I was like what, what did he say? And then he didn't say anything to me and then I heard my husband tell him that he was sorry, that it must have been really hard, that the situation he was in must be difficult and **that he understood and that he would contact the attorney that Mr. Generes had said to do and then they hung up.**
Q. During the time you were at the Happ Road rental property, what was the financial situation of your family? A. We used – initially, even for the contents so the children had clothes and a Christmas tree and all the things you need to live – we walked out of the house with absolutely nothing. We went out and used our own money. And we really weren't reimbursed probably until March for everything that we had bought. It was tight. It was very tight. We did have to use — of our own money. We had to be very careful about what we spent and how we spent it and what we committed to. Q. When, if you can recall, did the insurance company finally complete its reimbursement to you of the fire damage at your house? A. Well, they stage it in four different areas: The contents, the structure and that sort of thing. The structure, they just give all to the mortgage company and the mortgage company decides when they're going to give that back to you and then they release checks based on - Q. If I could just interrupt you. Maybe I can short circuit this. When, if you can recall, did you personally, Patty Morrell, receive the last reimbursement from the insurance company on the Clover Lane property? A. January or February of 19 – the year after the fire. I'm terrible with dates. January of '92, I believe, or February of '92. When you left the Happ Road rental property, did you examine the property after your furniture had been moved out? A. Very much, yes. I'm an immaculate housekeeper. I mean, I don't do it all myself, but I'm very serious. Q. Did your family do $8,000 worth of damage to the Happ Road property? A. No.
MR. KING: No further questions, your Honor.
MR. SANDACK: Mrs. Morrell, I only have a few questions. I'll be brief,

**CROSS EXAMINATION**
**BY MR. SANDACK:**

Q. Would you describe to me and the Court the method you employed in paying Mr. Generes for monthly rent when you were in the Happ residence? A. Would you repeat that? Q. How did you pay rent?

A. I write my monthly bills at the same time every month, and it's my practice – I have four kids. We take the Village payment over to the Village, and they get to drop it off. we do a lot of drop off. We do some mailing. We would either drop it off – we would hand it to somebody. **The children and I would walk over there or I would walk them or let them walk by themselves.** To my son, that was a big deal. If nobody answered, we'd put it in the mailbox. Q. So either you or one of your children walked it over? A. Right. Q. And that was done each and every month throughout your renting the property? A. To the best of my recollection, yes.

**Q. You mentioned under direct testimony that from time to time you received a lot of things at the Happ residence and if it was delivered, it was delivered to the front door. Is that your testimony? A. Yes.**

Q. You never received things at the garage entrance? A. Yes, I did.'

Q. You did? A. There were times when the garage door would be open. If we were working or if I was going in and out all day, I would have the garage door open while I was there, If I knew I was going out in ten minutes. Some people would come to the garage door, but also to the front door and the garage door.

Q. Where was it mostly if you had to quantify it? A. Mostly the front door.

**Q. And speaking of the garage door, did you have a conversation with Mr. Generes about the garage door falling off or out of track?** A. I did initially and then my husband–I don't know if–I did initially, and then I think **my husband had a discussion with him and then he sent a letter to him and I delivered it to him.** When I got no response, I did call him and ask him what, you know, what was the disposition. You know, what was his feeling on what we had to do communicate to him.

Q. Did you converge with your husband when he was typing up the letter? Did you talk about what the contents of the letter should say? A. No.

Q. Did he show it to you before? A. Yes. Q. And you physically walked it over and put it in the door? A. Or I might have mailed it. I don't know. I don't know. You don't know? A. No. It's my habit to mail most things other than bills.

**Q. Did you ever talk to an attorney prior to signing the lease or having your husband sign the lease? A. I believe my husband had an attorney who looked at it. I remember reading the lease carefully because there was a lot there.**

**Q. When you and your husband discussed your decision with Mr. Generes about extending the lease two months, did you take pen in**

**hand and write a letter? A. By that time, to be very honest with you, the four kids, the finances – my husband had been**
**THE COURT: Please, answer the question.**
**THE WITNESS: No, I didn't.**
MR. SANDACK: 1 have no further questions of this
MR. KING: Just one or two questions, your Honor.

**REDIRECT EXAMINATION**
**BY MR. KING:**

Q. With respect to the garage door, did you or your family abuse the garage door in any way? A. Not at all. Q. Did you believe that it was your obligation to repair it. A. Not according to the lease, but I was not going to argue. I was not going to press it. It wasn't worth it. Q. Did you in fact pay for it A . Yes. MR. KING: No more questions, your Honor.

**RECROSS EXAMINATION**
**BY MR. SANDACK:**

Q. **The issue was important enough to write a letter, right?**
A. As I've indicated, during that particular time, it was very stressful with the kids emotionally, the insurance company, everything.

MR. SANDACK: I have nothing further except for a very brief closing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
**BY THE COURT**

THE COURT: We'll dispense with the closings. The essential facts in this case up to a point, are undisputed. Sometime in December of 1990 the principal residences of the Morrells' was damaged due to a fire. As a result of the fire they were unable to stay in their home, and they had to move to some type of temporary shelter. After looking at several properties, the Morrells entered into a written six-month lease with the debtor/plaintiff in this case, Tasker Generes.

Now, Let me back up a second. The following shall constitute the Court's findings of fact and conclusions of law with respect to this complaint, and this is a core proceeding because it involves an objection to claim and counter claim. Otherwise, the claim by the debtor against the Morrells could be a related-to matter, a non-core matter. But because of the rights in the context of an objection to claim and counter claim, it's a core matter.

Having entered into this lease dated December 18, 1990 for six months with the debtor/plaintiff, Mr. Generes, the Morrells occupied the premises on Happ Road, the rental property on Happ Road, until mid August of 1991. The lease term expired on June 17, 1991. It became clear in the winter or early spring of 1991 that the repairs and additional construction on the Morrell's home that was damaged by fire would not be completed by the June 17, 1991 date by which their lease expired. The reasons are not in serious dispute. As a result, the Morrells testified that they contacted their insurer and arranged for an extension of the reimbursement terms of the insurance coverage whereby the insurance company would pay them for out-of-pocket expenses including the cost of renting substitute living quarters until the repairs could be made. It was this reimbursement that the Morrells used to pay for the rental of the Happ Road rental property. The Morrells testified that Mr. Morrell contacted Mr. Generes sometime in April or May of 1991 and sought an extension of the lease until August, approximately August 17, 1991. Mr. Generes denies that. Mr. Generes testified that on or about July 1, he sent a notice to – he delivered a notice to the Morrells invoking the provisions of Paragraph 8 of the lease and which provides for a renewal of the lease for one year. According to the lease terms, a rent calculated at double the rent specified in Paragraph 1 of the lease. Mr. Generes indicated in the copy of the letter –the letter purportedly delivered to the Morrells – that the doubling of the rent was waived. The Morrells deny ever receiving that letter. In any event, on or about August 17, 1991, the Morrells vacated the premises, the leased premises, at 1829 Happ Road in Northbrook. At the time they vacated they had paid the rent through the original six-month term and the two additional months in which they occupied the premises. Upon commencement of the lease, there was a security deposit tendered by the Morrells to Mr. Generes in the amount of $4,400. That was a negotiated amount.

The Morrells filed a claim in this estate for the return of the security deposit. Mr. Generes filed an adversary complaint objecting to that claim on a number of grounds, but, in addition, seeking, by way of counter claim, to recover the amounts due for the unexpired period of the lease for the additional year from June 17, 1991, through approximately June 17th, 1992, less the amounts received when the property was rented by Mr. Generes in about May 1992, a rental of $2,000 per month. And, I should add,

parenthetically, that the rent term on the original six-month lease was $2,200.

This case turns on the pure issue of credibility. If I believe Mr. Generes, that the notice was delivered, or, to the extent that the notice was not delivered, that he has elected, pursuant to common law, to treat the occupancy by the Morrells as a holdover situation and treat them as holdover tenants, then he is indeed entitled to what he prays for in his counter claim, at least in his counter claim as amended after dropping the claim for damage to the property.

If I believe the Morrells, that there was an oral extension agreement by which Mr. Generes agreed to extend the original six-month term of the lease for an additional two months for the same rental, then Mr. Generes, of course, is not entitled to that additional sum and they are entitled to the return of the security deposit.

I have listened to all of the witnesses and I have observed their demeanor in court. I will find that in fact, there was an agreement between Mr. Generes and the Morrells whereby the original period of the lease was extended for two months and two months only. That the notice was not delivered to the Morrells on July 1. The placing of the notice on the floor in the house is not delivery of the notice, and nor was the intent to treat them as holdover tenants in any way communicated to the Morrells during the periods at issue. That's up through and including June of 1992. The Morrells' testimony makes it clear. I believe Mr. Generes understood that the Morrells were only interested in renting until such time as their home was repaired.

Given that their failure to respond to the alleged notice of July 1, 1991, would seem to raise a real issue to Mr. Generes as to what was going on. He understood that they didn't intent to live in this property forever, and they certainly understood that. I just cannot understand why he assumed that their failure to respond to this alleged notice was an agreement on their part or acknowledgment on their part of his right to treat them as a holdover tenant. That's simply inconsistent with all of the circumstances of the case, and I just don't think that the delivery of the notice was reasonable under the circumstances. Nor, in fact, do I believe the notice was delivered at all or prepared at all.

So for those reasons I will deny the objection to claim. The Morrells will be allowed – the counter claim under the judgment for the Morrells on the counter claim. Mr. King, if you'll give me an order that reflects that, I will sign it. These proceedings will be concluded. Thank you very much.
MR. KING: Your Honor, when would you like the draft
THE COURT: Seven days. Circulate it before you submit
(Which was a transcript of proceedings held in the above-entitled matter as of this date.)
I hereby certify that the foregoing is an accurate transcript of proceedings held on June 30, 1993.
DATED 9/10/93 signed Kathie C. Pultz.

Supreme Court, U.S.
FILED
952049 JUN 18 1996
No. OFFICE OF THE CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM,1995

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

# APPENDIX "C"
# TO
# PETITION FOR WRIT OF CERTIORARI

I. COMPLAINT AND ANSWER
THE LEASE, AND EXHIBITS IN
THE ADVERSARY PROCEEDING
Generes v Morrell 92 A 01283
II. DOCKET STATEMENTS FROM ALL COURTS
III. TEXT OF APPLICABLE STATUTES

Tasker O de Generes
Counsel of Record
Counsel for Petitioner
1845 Happ Road
Northbrook, IL 60062-5643
(847) 564-8944
June 19, 1996

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I

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

| | | |
|---|---|---|
| TASKER GENERES | ) | |
| and DOROTHY GENERES, Jt. Debtors. | ) | 91 B-17220 |
| | ) | CHAPTER 11 |
| TASKER GENERES, | ) | JUDGE COAR |
| Plaintiff, | ) | |
| | ) | ADV. NO. 92 A 01283 |
| | ) | |
| EDWARD MORRELL and | ) | |
| PATRICIA MORRELL, | ) | |
| Defendants. | ) | |

**ANSWER**
TO ADVERSARY COMPLAINT OBJECTING TO CLAIM AND COUNTERCLAIM SEEKING DAMAGES FOR BREACH OF CONTRACT

Defendants, EDWARD L. MORRELL and PATRICIA MORRELL, by their attorneys, David B. Kahn, Ltd., for their answer state as follows:

**PARTIES. JURISDICTION AND VENUE**

1. Generes is an individual residing in Northbrook, Illinois

RESPONSE:

1. Deny knowledge or information sufficient to form a belief as to the truth of paragraph 1.

2. The Morrells are individuals residing in the judicial district which comprises the Northern District of Illinois.

RESPONSE:

2. Admit paragraph 2.

3. Tasker Generes and Dorothy Generes filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code ("Code") on August 14, 1991.
RESPONSE:
3. Admit that the named individuals have filed for protection under the Bankruptcy Code but deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 3.

4. Since the commencement of this case, the Debtors have continued to operate and manage their affairs as Debtors-in-possession, pursuant to Secs. 1107 and 1108 of the Code.
RESPONSE:
4. Deny knowledge or information sufficient to form a belief as to the truth of paragraph 4.

5. The Morrells have filed a claim in this case for $4,400, relating to a return of a security deposit under the terms of a written lease agreement between them and the Debtors.
RESPONSE:
5. Admit paragraph 5.

6. Generes brings this action to object to and disallow the claim of the Morrells filed in this bankruptcy case and to assert a counterclaim against the Morrells arising out of the same transaction which gives rise to their claim.
RESPONSE:
6. Admit that Generes purports to object to the Morrells' claims against him and to assert a counterclaim against the Morrells but deny that either the objection or counterclaim are meritorious.

7. This Court has subject matter jurisdiction to enter a final order disallowing the claim of the Morrells pursuant 28 U.S.C. Sec. 1334(b) and 28 U.S.C. Sec.157 (b)(2)(B).
RESPONSE:
7. Deny paragraph 7, except admit that Generes purports to allege that this Court has subject matter jurisdiction to disallow the Morrells' claim under 28 U.S.C. Sec. 1334(b) and 28 U.S.C. Sec. 157(b)(2)(B).

8. This Court has subject matter jurisdiction to enter a final order adjudicating the Plaintiff's counterclaim pursuant to 28 U.S.C. Sec. 1334(b) and 28 U.S.C. Sec. 157(b)(2)(C).
RESPONSE:
8. Deny paragraph 8, except admit that Generes purports to allege. that this Court has subject matter jurisdiction to adjudicate Generes's counterclaim under 28 U.S.C. Sec. 1334(b) and 28 U.S.C. Sec. 157(b)(2)(C).

9. The Northern District of Illinois is a proper forum in which to bring this action pursuant to 28 U.S.C. Sec. 1409(a).
RESPONSE:
9. Deny paragraph 9, except admit that Generes purports to allege that the Northern District of Illinois is a proper forum in which to bring this action under 28 U.S.C. Sec. 1409(a).

ALLEGATIONS COMMON TO ALL CLAIMS

10. The Morrells and Debtor Tasker Generes were parties to a written lease agreement dated December 18, 1990 ("Lease"), pursuant to which the Morrells occupied certain improved real estate commonly known as 1829 Happ Road ("Leased Premises"). A copy of the Lease is attached as Exhibit A.
RESPONSE:
10. Admit paragraph 10.

11. The Lease expired, by its own terms, on June 17, 1991. The Morrells remained in possession of and occupied the Leased Premises from June 18, 1991 through August 17, 1991.
RESPONSE:
11. Admit the allegations in paragraph 11 except that Generes orally agreed to extend the lease term through and including the date that the Morrells vacated the premises on a month-to-month basis at the same rental rate.

12. Pursuant to par. 8(a) of the Lease, Tasker Generes elected to treat the Morrells' continued possession of the Leased Premises as the renewal of the Lease for a term of one year, upon terms identical to those contained in the Lease. Tasker Generes expressly waived his right to double the rent during

the holdover or renewal term. A copy of the Notice which Tasker Generes mailed to the Morrells' on July 1, 1991 is attached as Exhibit 3.
RESPONSE:
12. Deny paragraph 12. Generes orally agreed to extend the lease term through and including the date that the Morrells vacated the premises on a month-to-month basis at the same rental rate. Generes had no right to double rent during the holdover because the Morrells did not agree to such a rental rate when the parties orally extended the lease on a month-to-month basis. The Morrells did not receive the notice attached as Exhibit 3 to the complaint.

13. At the time the Morrells surrendered possession of the Leased Premises, they had not paid rent for the lease month beginning July 18, 1991 in the amount of $2,200.
RESPONSE:
13. Deny Paragraph 13.

14. Additionally, as of the time the Morrells surrendered possession of the Leased Premises, they were in default under the terms of the Lease by failing to restore the Leased Premises to its condition as of the commencement of the Lease, reasonable wear excepted, as required by par. 4 of the Lease.
RESPONSE:
14. Deny paragraph 14.

15. Tasker Generes has incurred or expects to incur expenses of $8,127 in restoring the Leased Premises after the Morrells surrendered possession. A summary of these expenses is contained in Exhibit C.
RESPONSE:
15. Deny paragraph 15.

16. Tasker Generes was unable to find a new tenant for the Leased Premises until May, 1992
RESPONSE:
16. Deny knowledge or information sufficient to form a belief as to the truth of paragraph 16.

**COUNT I**
**(Objection to Claim)**

17. Generes realleges and incorporates pars. 1-16 as par. 17.
RESPONSE:
17. Reallege and incorporate their responses to pars. 1-16 as their response to par. 17.

18. The Morrells paid Tasker Generes the $4,400 as a security deposit.
RESPONSE:
18. Admit paragraph 10.

19. The Morrells are in default of their obligations under the Lease which default gives rise to claims against the Morrells under the Lease in an amount in excess of the security deposit held by Generes.
RESPONSE
19. Deny paragraph 19.

**COUNT II**
**(Counterclaim for Damages for Breach of Contract)**

20. Generes realleges and incorporates pars. 1-19 as par. 20.
RESPONSE:
20. Reallege and incorporate their responses to pars. 1-19 as their response to par. 20.

21. The current tenant of the Leased Premises pays a monthly rental of $2,000 and leases the property pursuant to a written agreement for a twelve month period which began on May 16, 1992
RESPONSE:
21. Deny knowledge or information sufficient to form a belief as to the truth of paragraph 21.

22. Pursuant to par. 17 of the Lease, the Morrells are obligated to pay all reasonable costs, attorneys fees and expenses incurred by Generes in the enforcement of his rights under the Lease.
RESPONSE:
22. Admit that par. 17 of the Lease so states but deny that they are required to pay Generes's costs, attorneys fees and expenses of this action.

23. Generes has fulfilled all of his obligations under the Lease.

RESPONSE:
23. Deny paragraph 23.

24. Pursuant to par. 3 of the Rider to the Lease, the Morrells are responsible for liquidated damages in the amount of $100 for each lease payment which is more than five days late.
RESPONSE:
24. Admit that par. 3 of the Rider to the Lease contemplates liquidated damages for late rental payments but deny that this covenant is legally enforceable or that their payments under the Lease were in fact late.

25. Generes has incurred and suffered damages as a result of the default of the Morrells in the amount of $31,427.00, exclusive of attorneys fees and other collection costs, which are summarized as follows:

a. rental charges from July 18, 1991 through May 17, 1992 ten months at $2,200 per month): $22,000

b. rental deficiency from May 18, 1992 through June 17, 1992 ($2,200 due; $2,000 received); $200.00

c. liquidated damages for late payments for lease months beginning July 17, 1991 through May 18, 1992 (11 months at $100 per month); and $1,100

d. damages and expenses in connection with restoring the property as summarized in Exhibit C: $8,127
RESPONSE:
25. Deny paragraph 25.

26. Generes has retained possession of the Morrells security deposit in the amount of $4,400.
RESPONSE:
26. Admit paragraph 26 and further assert that Generes's retention of the deposit is wrongful and in breach of the Lease.

27. The Morrells remain indebted to Generes for breach of their obligations under the Lease in the amount of $27,027.00, plus costs and expenses incurred by Generes in enforcing his rights under the Lease.

RESPONSE:
27. Deny paragraph 27.

**WHEREFORE**, defendants demand judgment in their favor and against the Joint Debtors and plaintiff, dismissing the objections to defendants' bankruptcy claims as well as plaintiff's counterclaims and for whatever other relief is justified in the premises.

EDWARD L. MORRELL
PATRICIA MORRELL
By:_____
Mark E. King
One of their Attorneys

**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that the attached ANSWER TO ADVERSARY COMPLAINT OBJECTING TO CLAIM AND COUNTERCLAIM SEEKING DAMAGES FOR BREACH OF CONTRACT was served on all attorneys listed below either by hand-delivery or by depositing the same in the United States Mailbox located at 200 West Adams Street, Chicago, Illinois 60606, with proper postage prepaid, all on the 19th day of October 1992:

**Abraham Brustein, Esq.**
**Christopher R. Smith, Esq.**
**SMITH, WILLIAMS & LODGE CHARTERED**
**55 West Monroe Street, Suite 1800**
**Chicago, Illinois 60603**

signed
(Mark King)

David B. Kahn, Esq. (ARDC No. 01381628)
Mark E. King, Esq. (ARDC No. 0619009l)
DAVID B. KAHN, LTD.
200 West Adams Street Suite 2701
Chicago, Illinois 60606 312/ 855-0955

## II
## EXHIBIT A:
## RESIDENCE LEASE
## ( GEORGE COLE LEGAL FORMS.)

Date of Lease: 12/18/90 Term: Beginning: 12/18/90 Ending: 6/17/91
Rent: $2200.00 per month. Security Deposit: $4,400.
Lessee: Edward L & Patricia Morrell, Lessor: Tasker Generes
Premises: 1829 Happ Road, Northbrook, IL 60062-5643.
Lessor's address: 1845 Happ Road, Northbrook, IL 60062.

In consideration of the mutual covenants and agreements herein state, Lessor hereby leases to Lessee and Lessee hereby leases from Lessor for a private dwelling the house designated above (the "Premises"), together with the appurtenances thereto, for the above term.

1. Lessee shall pay Lessor as rent for the Premises the sum stated above, monthly in advance, until termination of this lease, at Lessor's address stated above or such other address as Lessor may designate in writing. Time of each such payment is of the essence of this agreement.

2. Lessee has deposited with Lessor the Security Deposit stated above as security for the performance of all covenants and agreements of Lessee hereunder. Lessor may at any time or times apply all or any portion thereof in payment of any amounts due Lessor from Lessee. Upon termination of the lease and full performance of all of Lessee's obligations hereunder, so much of the Security Deposit as remains unapplied shall be returned to Lessee. The Security Deposit shall not bear interest unless and except as required by Illinois statute.

3. Lessee acknowledges that the Premises are in good repair, except as herein otherwise specified, and that no representations as to the condition or repair thereof have been made by the Lessor, or Lessor's agent, prior to or at the execution of this lease, that are not herein expressed.

4. The Lessee covenants and agrees with Lessor to take good care of and keep in clean and healthy condition the Premises and their fixtures, and to commit or suffer no waste therein; that no changes or alterations of the Premises shall be made or partitions erected, nor walls papered without the

consent in writing of Lessor; that Lessee will make all repairs required to the walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures belonging to the Premises, whenever damage or injury to the same shall have resulted from misuse or neglect; and Lessee agrees to pay for any and all repairs that shall be necessary to put the Premises in the same condition as when he entered therein, reasonable wear and loss by fire excepted, and the expense of such repairs shall be included within the terms of this lease and any judgment by confession entered therefor.

5. Except as required by Illinois statute, the Lessor shall not be liable for any damage occasioned by failure to keep the Premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam. or other pipes, sewerage, or the bursting, leaking or running from any cistern, tank, washstand, water closet or waste pipe in, above, upon or about the Premises. nor for damage occasioned by water, snow or ice, being upon or coming through the roof, skylight, trap door or otherwise, nor for any damage arising from acts or neglect of any owners or occupants of adjacent or contiguous property.

6. Lessee will not allow the Premises to be used for any purpose that will increase the rate of insurance thereon. nor for any purpose other than that hereinbefore specified. nor to be occupied. in whole or in part, by any other person, and will not sublet the same, or any part thereof, nor assign this lease. without in each case the Lessor's written consent had, and will not permit all transfer. by operation of law, of the interest in the Premises acquired through this lease; and will not permit the Premises to be used for unlawful purpose or purposes that will injure the reputation of the same or of the neighborhood; will keep no dogs, cats or other animals or pets in or about the Premises; will not permit the Premises to remain vacant or unoccupied for more than ten consecutive days; and will not permit any alteration of or upon any part of the Premises, nor allow any signs or placards posted or placed thereon. except by written consent of the Lessor, all alterations and additions to the Premises shall remain for the benefit of the Lessor unless otherwise provided in said consent.

7. If Lessee shall abandon or vacate the Premises, the same shall be re-let by the Lessor for such rent, and upon such terms as Lessor may see fit; and if a sufficient sum shall not be thus realized, after paying the expenses of such

re-letting and collecting, to satisfy the rent hereby reserved. the Lessee agrees to satisfy and pay all deficiency.

8. If the Lessee retains possession of the Premises or any part thereof after the termination of the term by lapse of time or otherwise, then the Lessor may at Lessor's option within thirty days after the termination of the term serve written notice upon Lessee that such holding over constitutes either (a) renewal of this lease for one year, and from year to year thereafter, at double the rental specified under Section I for such period, or (b) creation of a month to month tenancy. upon the terms of this lease except at double the monthly rental specified under Section 1, or (c) creation of a tenancy at sufferance, at a rental of_ _ dollars per day for the time Lessee remains in possession. If no such written notice is served then a tenancy at sufferance with rental as stated at (c) shall have been created. Lessee shall also pay to Lessor all damages sustained by Lessor resulting from retention of possession by Lessee.

9. Naphtha, benzine, benzole, gasoline, benzine-varnish, gunpowder, fireworks, nitroglycerin. phosphorus, saltpeter. nitrate of soda, camphene, spirit-gas, or any flammable fluid or oil. shall not be allowed or used on the Premises without the written permission of the Lessor.

10. Lessee shall pay (in addition to the rent above specified) all water taxes and all gas, electricity-and power bills, levied or charged on or in respect of the Premises, for and during the term of this lease, and in case no water taxes are levied specifically on or in respect of the Premises, to pay the ____ part of all water taxes levied or charged on or in respect of the building of which the Premises constitutes a part; and in case said water taxes and gas, electricity and power bills shall not be paid when due, Lessor shall have the right to pay the same, which amount so paid, together with any sums paid by Lessor to keep the Premises and their appurtenances in good condition as hereinbefore specified, shall be due and payable with the next installment of rent due thereafter under this lease.

11. Lessor reserves the right to put up a "To Rent" sign sixty days prior to the expiration of this lease and a "For Sale" sign at any time during the term of this lease.

12. Lessee will in every respect comply with the ordinances of the municipality aforesaid, with the rules and orders of the health officers thereof, with the orders and requirements of the police department, with the requirements of any underwriters' association so as not to increase the rates of insurance upon the building and contents thereof, and with the rules and orders of the fire department in respect to any matters coming within their jurisdiction.

13. If default be made in the payment of the above rent, or any part thereof, or in any of the covenants herein contained to be kept by Lessee, it shall be lawful for Lessor at any time, at his election, without notice, to declare said term ended and to reenter the Premises, or any part thereof, with or without process of law, and to remove Lessee or any persons occupying the same, without prejudice to any remedies which might otherwise be used for arrears of rent, and Lessor shall have at all times the right to distrain for rent due and shall have a valid and first lien upon all personal property which Lessee owns or may hereafter acquire or have an interest in, whether exempt by law or not, as security for payment of the rent herein reserved.

14. The Lessee hereby irrevocably constitutes any attorney of any court of record in this state. attorney for Lessee in Lessee's name, on default by Lessee of any of the covenants herein, and upon complaint made by Lessor, his agent or assigns, and filed in any such court to enter Lessee's appearance in any such court of record, waive process and service thereof, and confess judgment, from time to time, for any rent which may be due to Lessor, or the Lessor's assignees, by the terms of this lease, with costs and a reasonable sum for attorney's fees, and to waive all errors and all right of appeal from said judgment, and to consent in writing that a writ of execution may be issued immediately.

15. After the service of notice, or the commencement of a suit, or after final judgment for possession of the Premises, the Lessor may receive and collect any rent due, and the payment of said rent shall not waive or affect said notice, said suit, or said judgment.

16. In case the Premises shall be rendered untenantable by fire or other casualty, Lessor may at his option terminate this lease, or repair the Premises within thirty days, and failing so to do, or upon the destruction of the Premises by fire, the term hereby created shall cease and determine.

17. The Lessee further covenants and agrees to pay and discharge all reasonable costs, attorney's fees and expenses that shall be made and incurred by Lessor in enforcing the covenants and agreements of this lease.

18. The words "Lessor" and "Lessee" wherever herein occurring and used shall be construed to mean "Lessors" and "Lessees" in case more than one person constitutes either party to this lease, and all such persons shall be jointly and severally liable hereon; and all the covenants and agreements herein contained shall be binding upon, and inure to, their respective successors, heirs, executors, administrators and assigns and be exercised by his or their attorney or agent.

19. If any clause, phrase, provision or portion of this lease or the application thereof to any person or circumstance shall be invalid, or unenforceable under applicable law, such event shall not affect, impair or render invalid or unenforceable the remainder of this lease nor any other clause, phrase, provision or portion hereof, nor shall it affect the application of any clause, phrase, provision or portion hereof to other persons or circumstances.

**WITNESS**
the hands and seals of the parties hereto,
as of the Date of Lease stated above.

**signed (Edward L & Patricia Morrell) 12/18/95 (SEAL)**

**signed (Tasker Generes 12/18/95 (SEAL)**

**LEASE RIDER**

Edward L. & Patricia Morrell, Lessees
Date of Lease 12/18/90
Term beginning 12/18/90
Term ending 6/17/91.
Premises of 1829 Happ Rd., Northbrook, IL. 60062-5643.

1. Lessee acknowledges that the following items are part of the Premises and will return same in clean normal working condition and will regularly maintain them properly:

a). Kenmore pilot free oven model t278 324 8296 Ser No. 6P16105.

b). General Electric Dishwasher Model GSD400WOBK Ser No. RH643235B.

c). Maytag pilot free gas cooktop model DCS6500 Ser. No. 56360RE. Undershelf Toastmaster toaster. Two counter-protectors. Paper Towel Holder.

d). Kohler 36" Brookfield Sink Model 592.

e). Kitchen Aire Ventilator disposal model 175.68570 Ser. No. CL677511.

g). Mirrored wall in Dining Room.

h). Mirrors behind all bath doors.

i). Monarch mirrored closet doors in master bedroom closet.

j). Two Monarch mirrored closet doors in other bedroom which has a private bath.

k). Wing Decorator wood and mirror entrance closet door. (Currently stored in garage to allow area for display)

l). Two direct wired smoke detectors with battery backup.

m). Nutone door chime.

n). Amana Air Command Furnace

o). Amana Hi Efficiency Central Air Conditioner

p). Lake Air 1400 Electronic Air Cleaner.

q). Stevens Model SS35F Submersible Sump Pump

r). Three bedrooms other than master carpeted with 100% Wool Marshall Fields "Field Tone" installed tackless over Field Tred rubber padding using 60 sq. yds. 12 feet wide. SW bedroom carpet has a slight stain by the window. **Lessee accepts this condition.**

s). Master bedroom 32 sq. yds. Carefree Stainmaster carpet.

t). Living Room Dining Room, Family Room, and three bedroom hallway floored with oak strip flooring.

u). Atrium Room Corinthia MG 6 Ceramic Tile (Existing floor has missing tiles by Center Island. **Lessee accepts this condition as is.**

v). Master Bath Ceramic tile floor and bath walls. Shower curtain road and four towel bars.

w). Entry, hall bath, and NE bath floors are Ceramic Tile Bianco D'Italia Iris Mono 1200 C ingliva Ia Scelta Ceramic Tile. Entry Dead Bolt and Handle Lock sat by Schlage.

x). Shower in NE bath is Artesian 36" base shower system. Towel racks, Oak vanity with integral Corfram sink. Mirror above sink. Cream color shower curtain and rod supplied. Two towel bars and one set of hanger hooks.

y). All other floors no wax solarian or vinyl tile.

z). Moen or True Value Master Plumber brand faucets in lavatories and baths, including Moen Touch Control Model 87545 Riser Kitchen Sink faucet. White Shower curtain and rod with two towel bars in hall bath.

aa). State Water Heater Self Cleaning Model Sev 40 NRT6JW.

ab). Whirlpool Heavy Duty LA 6301 XS Clothes Washer.

ac). General Electric Clothes Dryer-Heavy Duty Commercial. model DDC 4580L WH Serial A13 0311G.

ad). Sear garage door opener and two remote control units. 139654001 002144.

as). Amana Refrigerator SXPD w/black glass 36" side by side with water and ice dispensers.

af). Two sets of Malibu 10 Light Tier II outdoor lights installed in front yard with timer/transformer at West side and South side of house.

ag). Drip irrigation watering system on South side of house.

ah). Two Line Wall Phone installed in kitchen.

ai). Joanna Vertical Blinds in Living and Dining Room.

aj). Levelor Miniblinds on all other windows except Atrium room with Brass Atrium Dead Bolt Lock Set in Family room.

ak). Makeup mirror with stage lights is installed in master bedroom on NE walk-in closet wall on bedroom side.

al) All rooms have recessed lighting fixtures in ceiling. Lessee agrees to replace bulbs that wear out.

am). Five Wire Rack Shelfs in pantry.

2. Lessee agrees to pay a checks returned unpaid fee of $25 per time.

3. Lessee agrees to pay a late payment fee of $100 if rent is more than 5 days late. Lessee hereby acknowledges that late payment by Lessee to Lessor of rent and other sums due hereunder will cause Lessor to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Lessor will incur by reason of late payment by Lessee. **Acceptance of such late charge by Lessor shall in no event constitute a waiver of Lessee's default with respect to such overdue amount, nor prevent Lessor**

**from exercising any of the other rights and remedies granted hereunder**.

4. **Lessee will keep the lawns, beds, shrubs, and trees, properly maintained, watered, sprayed for insects and fertilized**. Lessee will see to it that lawns are mowed every week during the season and keep free of dandelions and other weeds. Otherwise lessor may retain a service and add it to the rent.

5. Lessee agrees to permit lessor access at reasonable times to make improvements to the premises and to improve the landscaping in his discretion, or for showing the premises to prospective lenders, purchasers or their agents or appraisers and village inspectors, meter readers, and repairmen.

6. Subordination: Upon request of lessor, lessee will in writing subordinate its right hereunder to the lien of any mortgage or mortgages, or the lien resulting from any other method Or financing hereafter placed upon the real property of which the premises are a part, and to all advances made or hereafter to be made upon the security thereof.

7. Insurance: Lessee shall maintain a renter's insurance policy on the premises with standard $100,000/$300,000 liability limits.

8. Bankruptcy: (a) The appointment of a receiver to take possession of all or substantially all of the assets of Lessee, or (b) general assignment for the benefit of creditors, or (c) any action taken or suffered by Lessee under any insolvency or bankruptcy act shall, at the option of the Lessor, constitute a breach of this lease by Lessee and thereupon this lease shall immediately end and terminate and shall in nowise be treated as an asset of Lessee after the exercise Or such option.

9. Smoke Detectors: Lessee acknowledges receipt of instruction on use of the equipment including the smoke/fire detectors. Lessee acknowledges that it is lessees responsibility to regularly test the detectors and to replace at lessee's expense the batteries. Lessee agrees to observe all laws regarding upkeep, maintenance, and testing of smoke detectors.

10. Change in occupancy: Should the number of occupants increase or the premises be subletted, then the lessee agree to furnish an additional month's rent as an additional security deposit.

11. Living Room Ceiling has a small drill hole next to one SW corner ceiling light. Dining Room ceiling had a leak which has been repaired. However, the ceiling has parted drywall tape. **Lessee accepts the premise with these ceilings as is.**

12. Garage has damage to drywall. Small fender imprint on front wall and near floor on SW side. **Lessee accepts the premise with this condition.**

14. The pantry door is damaged. **Lessee accepts the premise with this condition.**

15. **The family pet poodle is allowed; but no other pets are allowed without written consent of the lessor**.

Signed ( Edward L. & Patricia Morrell 12/18/90)
Signed ( Tasker Generes 12/18/90)

**EXHIBIT B**
**Notice of Holdover Tenancy**

Dorothy and Tasker Generes
18 4 5 Happ Road.
Northbrook, IL 60062

Edward and Patricia Morrell
1829 Happ Road
Northbrook, IL 60062

July 1, 1991

Dear Patti,

Since you have held over past the expiration of your lease, this is your written notice that we are exercising our option under paragraph 8(a) of the

lease for 1829 Happ to renew the lease for one year, and from year to year thereafter, at $2,200 dollars per month .

Your lease provides as follows in paragraph 8.

If the lessee retains possession of the Premises or any part thereof after the termination of the term by lapse of time or otherwise, then the Lessor may at Lessor's option within thirty days after the termination of the term serve written notice up lessee that such holding over constitutes either (A) renewal of this lease for one year, and from year to year thereafter, at double the rental specified under Section 1 for such period, or .....

We waive the doubling of the rent.

Yours truly,

Tasker Generes

## EXHIBIT C

### 1829 HAPP INSPECTION

| | |
|---|---|
| Patch drywall and paint interior use bleach to kill mold in baths, several coasts need on wood trim: | |
| Paint: Northbrook Paint, 1340 Meadow Road | $300 |
| Labor: Scrape, patch, prim and paint | $3099 |
| *1 Dead 16 foot fir tree due to failure to water: | $1800 |
| Carpet dirty and spotted must be washed: Perfection Cleaning | $100 |
| Kitchen counter by sink used as cutting board, replace counter, two missing hot counter protectors for center island and legs broken off into counter: | |
| *2 Material | $524 |
| *2 Labor: remove sink and gas cooktop and reinstall | $600 |
| Refinish Oak Floors: Robert's Flooring | $700 |
| Replace Bath Vent: Effective Air | $472 |
| Advertise in Pioneer Press | $531 |

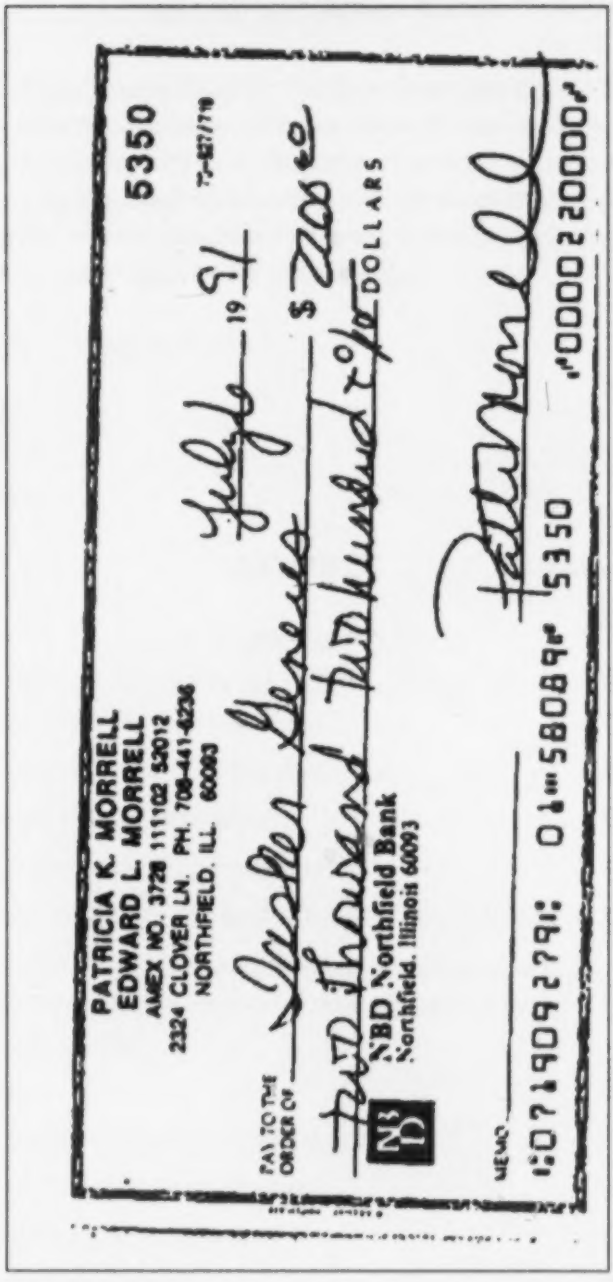
Total: $8127.

*1. Estimate from Chalet Nursery, tree not yet replaced

*2 Counters not yet replaced, estimate based on original cost

III

JULY 6, 1991 CHECK



## DOCKETS
## A. BANKRUPTCY COURT ADVERSARY DOCKET

| BANKRUPTCY ADVERSARY PROCEEDING DOCKET | | | | | | DOCKET # 92-01283 |
|---|---|---|---|---|---|---|
| FILING DATE MO DAY YEAR | P | N/S | O | R | DEMAND IN $1000 | RELATED BANKRUPTCY DOCKET |
| 09/12/92 | 3 | 498 | 1 | N | 27 | 91-17220 |

| PLAINTIFF(S) | DEFENDANT(S) |
|---|---|
| 1. TASKER GENERES | 1. MORRELL, EDWARD L |
| | 2. MORRELL, PATRICIA |
| **CAUSE** | |
| COMPLAINT OBJECTION TO CLAIM AND COUNTERCLAIM | |
| **ATTORNEYS** | |
| 1. CHRISTOPHER R SMITH<br>55 WEST MONROE STE 1800<br>CHICAGO, IL 60603<br>(312) 853-3230 | 1. DAVID B KAHN<br>ONE NORTHFIELD PLAZA<br>NORTHFIELD, IL 60093<br>(708) 501-5083<br><br>2. No attorney entered. |
| FILING FEE: Paid | |

**Docket for Adversary Case No. 92-01283A in re: 91-17220**

GENERES V MORRELL

| | | |
|---|---|---|
| 09/21/92 | 1 | ADVERSARY Complaint [EOD 09/22/92][DS] |
| 09/21/92 | 2 | COVER Sheet [EOD 09/22/92][DS] |
| 09/21/92 | 3 | ISSUED Summons - Status Hearing on 11/03/92 at 10:00 a.m. at 219 South Dearborn, Courtroom 742, Chicago, IL 60604. (1 copies)[EOD 09/22/92][DS] |
| 11/03/92 | 3A | HEARING Continued to 3/26/93 Stricken & Reset and |
| | | Concluded on 06/30/93 at 2:00 p.m. Re: Item # |
| | | 3.[EOD 07/15/93][CM] |
| 09/21/92 | 4 | RECEIPT No. 38930 [EOD 09/22/92][DS] |
| 09/21/92 | 4A | INTAKE Checklist [EOD 09/22/92][DS] |
| 09/25/92 | 5 | CERTIFICATION of Service on Edward L & Patricia Morrell Re: Item # 3.[EOD 09/28/92][DS] |
| 10/19/92 | 6 | AFFIDAVIT Prescribed by General Rule 39 by David B Kahn for defendants [EOD 10/21/92][MW] |
| 10/19/92 | 7 | AFFIDAVIT Prescribed by General Rule 39 by Mark E King for Edward L & Patricia Morrell [EOD 10/21/92][DS] |
| 10/19/92 | 8 | APPEARANCE by Mark E King for Edward L and Patricia Morrell [EOD 10/21/92][JO] |
| 10/19/92 | 9 | ANSWER To Adversary Complaint objecting to claim and counter claim seeking damages for breach of contract Re: Item #1.[EOD 10/22/92][LB] |
| 10/19/92 | 10 | APPEARANCE for Edward L Morrell and Patricia Morrell by David B. Kahn [EOD 10/21/92][JO] |

| | | |
|---|---|---|
| 11/10/92 | 11 | PREHEARING ORDER on 03/26/93 at 2:00 p.m. at 219 South Dearborn, Courtroom 742, Chicago, IL 60604. [EOD 12/02/92][LB] |
| | | [VACATED] Re: Item # 13.[EOD 03/23/93][DS] |
| 11/10/92 | 11A | STIPULATION [EOD 12/02/92][LB] |
| 11/10/92 | 11B | DISCOVERY due by 01/29/93[EOD 12/02/92][LB] |
| | | *SEE DRAFT ORDER FOR FURTHER PARTICULARS [* EOD 12/02/92][LB] |
| 01/28/93 | 12 | PROOF of Service on Subpoena [EOD 02/02/93][MC] (WAYNE FRANKFORT) [EOD 02/05/93][MC] |
| 03/15/93 | 13 | PREHEARING ORDER Trial (AMENDMENT) on 06/30/93 at 2:00 p.m. Re: Item # 1.[EOD 03/23/93][DS] |
| 03/15/93 | 13A | EXHIBIT(S) and Witness lists will be exchanged on or before 6/15/93 [EOD 03/23/93][DS] |
| 03/15/93 | 13B | FINDINGS of Fact and Conclusions Of Law optional trial brief, joint stipulated facts, and written objections to exhibits will be filed on or before 6/22/93. [EOD 03/23/93][DS] |
| 03/16/93 | 14 | NOTICE of Motion [EOD 03/24/93][AM] |
| 03/16/93 | 14A | MOTION to Amend The Pretrial Scheduling Order |
| | | (Joint) by Plaintiff and Defendants [EOD |
| | | 03/24/93][AM] |
| 06/16/93 | 15 | NOTICE of Filing [EOD 06/18/93][LJ] |
| 06/16/93 | 15A | LIST of Witnesses and Exhibits by Plaintiff/Tasker Generes [EOD 06/18/93][LJ] |
| 06/22/93 | 16 | NOTICE of Filing of Plaintiff' Proposed Findings of Fact and Conclusions of Law and Plaintiff's Objections to Defendants' Proposed Exhibits [EOD 06/24/93][DR] |
| 06/22/93 | 17 | FINDINGS of Fact and Conclusions of Law (Proposed) by Defendant Re: Item # 13B.[EOD 06/24/93][MJ] |
| 06/22/93 | 18 | OBJECTION To Plaintiff's Exhibits by Defendants [EOD 06/24/93][LD] |

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| 06/22/93 | 19 | OBJECTION To Defendants' Exhibits by Plaintiff, Tasker Generes [EOD 06/25/93][AM] |
| 06/25/93 | 20 | STIPULATION as to Certain Facts and Documents by Plaintiff Tasker Generes [EOD 06/29/93][MJ] |
| 06/22/93 | 21 | FINDINGS of Fact and Conclusions of Law by Plaintiff [EOD 6/30/93][EH] |
| 06/16/93 | 22 | NOTICE of Filing [EOD 07/15/93][CM] |
| 06/16/93 | 22A | LIST of Witnesses and Exhibits by Tasker Generes, Plaintiff [EOD 07/15/93][CM] |
| 06/16/93 | 23 | LIST of Exhibits by Edward L & Patricia Morrell, Defendants [EOD 07/15/93][CM] |
| 06/28/93 | 24 | LIST of Witnesses (Amended) by Edward L & Patricia Morrell, Defendants [EOD 07/15/93][CM] |
| 07/08/93 | 25 | ORDER Final in favor of Defendants Edward and Patricia Morrell and against Plaintiff Tasker Generes in accordance with this order. [EOD 07/15/93][CM] |
| | | *SEE DRAFT ORDER FOR FURTHER PARTICULARS [* EOD 07/15/93][CM] |
| | | **BIIIB REPORT** [EOD 07/15/93][CM] |
| 07/26/93 | 26 | NOTICE of Motion [EOD 07/28/93][CM] |
| 07/26/93 | 26A | MOTION for a New Trial by Plaintiff [Disposed][EOD 07/28/93][CM] |
| 07/28/93 | 27 | ORDER Striking Motion for Plaintiffs failure to Notice this Motion for a date certain pursuant to Local Rule 12 Re: Item # 26A.[EOD 08/12/93][CM] |
| 08/16/93 | 28 | NOTICE of Motion [EOD 08/19/93][JG] |
| 08/16/93 | 29 | MOTION For a New Trial by Plaintiff Re: Item # 28. [Disposed][EOD 08/19/93][JG] |
| 08/16/93 | 30 | MINUTE ORDER - Motion Denied For Reasons Stated in Open Court Re: Item # 29.[EOD 08/19/93][JG] |
| 08/23/93 | 31 | NOTICE of Motion [EOD 08/23/93][CM] |
| 08/23/93 | 31A | MOTION for Stay on Appeal by Plaintiff [Disposed][EOD 08/23/93][CM] |

| | | |
|---|---|---|
| 08/23/93 | 32 | ORDER that this Courts order entered 7/15/93 is hereby Stayed pending appeal. Appellants Superseadas bond in the amount of $5120 is approved and shall be filed forthwith. Re: Item # 31A. [EOD 08/23/93][CM] |
| 08/23/93 | 33 | Supersedeas Bond in the amount of $5120 to be paid to Edward and Patricia Morrell from judgment of 7/15/93[EOD 08/23/93] [CM] |
| 08/23/93 | 33A | AFFIDAVIT of Justification for Supersedeas Bond by |
| | | Tasker Generes [EOD 08/23/93][CM] |
| 08/23/93 | 33B | AFFIDAVIT of Justification for Supersedeas Bond by Dorothy Generes [EOD 08/23/93][CM] |
| 08/19/93 | 34 | NOTICE of Filing [EOD 08/24/93][MI] |
| 08/19/93 | 34A | NOTICE of Appeal by Plaintiff/Tasker Generes Re: Item # 25.[EOD 08/24/93][MI] |
| 08/20/93 | 35 | DELIVERED/MAILED Copies to Bankruptcy Judge Coar and attorneys of record Re: Item # 34A. [EOD 08/24/93][MI] |
| 08/23/93 | 36 | NOTICE of Filing Re: Item # 33. [EOD 08/25/93][CM] |
| 08/20/93 | 37 | NOTICE of Filing of Transcript Information Sheet re: hearings of 6/30/93 (Trial) and 8/16/93 [EOD 08/25/93] [CM] |
| 08/30/93 | 38 | NOTICE of Filing [EOD 08/30/93][CM] |
| 08/30/93 | 38A | DESIGNATION of Items to be included in the Record and Statement of Issues on Appeal Re: Item # 34A.[EOD 08/30/93][CM] |
| 08/30/93 | 39 | NOTICE of Cross-Appeal by Defendants Re: Item # 34A.[EOD 08/31/93][CM] |
| 08/31/93 | 40 | DELIVERED/MAILED Copies to Bankruptcy Judge Coar, Debtors and US Trustee Re: Item # 39.[EOD 09/02/93][CM] |
| 09/09/93 | 41 | DESIGNATION of Items to be included in the Record and Statement of Issues to be presented on Appeal Re: Item # 39.[EOD 09/09/93][CM] |
| 09/10/93 | 42 | NOTICE of Change of Address of Attorney for |

| | | |
|---|---|---|
| | | Defendants [EOD 09/13/93][CM] |
| 09/13/93 | 43 | TRANSCRIPT Filed of Proceedings of Hearing on 6/30/93 at 2:00 p.m. before Judge Coar [EOD 09/15/93][CM] |
| 09/13/93 | 44 | TRANSCRIPT Filed of Proceedings on Hearing of 8/16/93 at 10:00 a.m. before Judge Coar [EOD 09/15/93][CM] |
| 09/13/93 | 45 | TRANSCRIPT Filed of Proceedings on Hearing of 6/30/93 at 2:00 p.m. before Judge Coar [EOD 09/15/93][CM] |
| 09/20/93 | 46 | DESIGNATION of Items to be included in the Record (ADDITIONAL) by Tasker Generes, Appellant/Cross-Appellee [EOD 09/21/93][CM] |
| 09/22/93 | 47 | TRANSMITTED to U.S.D.C. Record Consisting of One Volume of Pleadings, Assigned 93C5884 to Judge Marovich and Magistrate Judge Bobrick Re: Item # 39.[EOD 09/28/93][JG] |
| 05/06/94 | 48 | LETTER dated May 05, 1994, Certified copy of the Judgment Order of this court disposing of the appeal [EOD 05/10/94][FN] |
| 05/06/94 | 49 | **CERTIFIED Copy of Order From the U.S. District Dated: Mar 14. 1994 - *(This order also concerns 92 A 1283) Pursuant to Court is affirmed except that this Court reverses that part of the Bankruptcy Court's judgment that denied attorneys fees and costs to the defendants, and remands the case to the Bankruptcy Court to determine and impose attorney's fees and costs (District Court No. 93 C 5884, Judge Marovich)** [EOD 05/10/94][FN] |
| 05/06/94 | 50 | CERTIFIED copy of Judgment Order For the foregoing reasons, we reverse that part of the Bankruptcy Court's judgment that denied attorney' s fees and costs to the defendants, and remand the case to the Bankruptcy Court to determine and impose attorney's fees and costs pursuant to Bankruptcy Rule 7054(b) (District Court No. 93 C 5884 - Judge Marovich) Re: Item # 49.[EOD 05/10/94][FN] |

| | | |
|---|---|---|
| 07/22/94 | 51 | ORDER And Notice Regarding the remand on attorney's fees and cost to defendants. on 08/29/94 at 10:00 a.m. at 219 South Dearborn, Courtroom 742, Chicago, IL 60604. [EOD 07/25/94][BZ] |
| | | [STRICKEN] Re: Item # 53.[EOD 08/26/94][CM] |
| 07/22/94 | 52 | CERTIFICATION of Service Re: Item # 51.[EOD 07/25/94][BZ] |
| 08/23/94 | 53 | MINUTE ORDER - that the courts Order and Notice setting this matter for status regarding remand on attorney's fees and costs to defendants set for 8/29/94 at 10:00 a.m. [Stricken]. [EOD 08/26/94][CM] |
| 10/27/94 | 54 | ORDER Case Reassigned to Judge Barliant effective 10/31/94 [EOD 11/03/94][JA] |

**DISTRICT COURT DOCKET**

I, H. STUART CUNNINGHAM, Clerk of the United States Northern District of Illinois, do hereby certify to the United States Court of Appeals, for the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office, on the dates in the List of Documents, an together with a true copy of docket entries as they appear in the official dockets in this office.

Constitutes the original record on appeal consisting of one (1) volume of pleadings and a list of documents transmitted in the cause entitled;

Tasker Generes v Edward L. Morrell, et al
Plaintiff/Appellant Defendants/Appellees
**U.S.D.C. No. 93 CV 5884**
**U.S.D.C. No. 94-1647**

In Testimony Whereof, I here onto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this; April 19, 1994 H. STUART CUNNNGHAM, Clerk, by Gerri McDade (Deputy Clerk).

Proceedings include all events.
**1:93cv5884 Generes v Morrell, et al**

| | | |
|---|---|---|
| 9/27/93 | 1 | BANKRUPTCY RECORD ON APPEAL by Tasker Generes from Judge Coar's order of 7/15/93 consisting of one volume of pleadings and certified copy of docket entries; Civil cover sheet (Documents 1-1 through 1-3). (jmp) [Entry date 09/28/93] |
| | | |
| 9/28/93 | – | MAILED Bankruptcy Rule 8007(b) letter to all counsel of record. (jmp) |
| | | |
| 10/5/93 | 2 | MINUTE ORDER of 10/5/93 by Hon. George M. Marovich : Cross appellants are ordered to file their opening briefs by 10/20/93. Answer briefs are to be filed by 11/4/93. Replies by 11/18/93. Mailed notice (cmf) [Entry date 10/08/93] |
| | | |
| 10/19/93 | 3 | NOTICE by appellant Tasker Generes of change of address (jmp) |
| | | |
| 10/19/93 | 4 | MOTION by appellant Tasker Generes to extend the time to file appellants' brief (Exhibit); Notice of motion (jmp) [Entry date 10/20/93] |
| | | |
| 19/19/93 | 5 | MINUTE ORDER of 10/19/93 by Hon. George M. Marovich : Granting motion to extend the time to file appellants' brief [4-1]. Cross appellants are to file opening briefs by 11/15/93. Answer briefs are to be filed by 12/01/93 and replies by 12/15/93. Mailed notice (jmp) [Entry date 10/20/93] |
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| 11/1/93 | 6 | MINUTE ORDER of 11/1/93 by Hon. George M. Marovich : Appellant is directed to file his pro se appearance, and the Clerk of the Court is directed to add his appearance to the |

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| | | service list. Mailed notice (tlm) [Entry date 11/02/93] |
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| 11/1/93 | 7 | RULE 39 Affidavit of Pro Se Tasker Generes (tlm) [Entry date 11/02/93] |
| | | |
| 11/15/93 | 8 | OPENING brief by cross-appellants Patricia Morrell, appellee Edward L Morrell (cmf) [Entry date 11/16/93] |
| | | |
| 11/15/93 | 9 | APPELLANT's Brief by appellant Tasker Generes (Exhibits). (cmf) [Entry date 11/16/93] |
| | | |
| 12/1/93 | 10 | ANSWER by cross-appellee (Exhibits). (cmf) |
| | | |
| 12/1/93 | 23 | APPELLEE's opposition brief by Edward L Morrell, Patricia Morrell (Temporarily unavailable for docketing). (11) [Entry date 04/19/94] |
| | | |
| 12/15/93 | 21 | CROSS-APPELLANTS' reply brief by Edward L Morrell, Patricia Morrell (Temporarily unavailable for docketing). (11) [Entry date 04/19/94] |
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| 12/15/93 | 22 | AFFIDAVIT of Mark E. King in support of cross-appellants' reply brief [21-1] (Temporarily unavailable for docketing). (11) [Entry date 04/19/94] |
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| 12/21/93 | 12 | MOTION by appellant Tasker Generes for extension of time to file reply brief ; Notice of motion (jmp) [Entry date 01/10/94] |
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| 12/21/93 | 13 | MINUTE ORDER of 12/21/93 by Hon. George M. Marovich : Granting motion for extension of |

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| | | time to 01/03/94 to file reply brief [12-1]. Telephoned notice (jmp) [Entry date 01/10/94] |
| | | |
| 1/3/94 | 11 | REPLY brief by appellant Tasker Generes (jmp) [Entry date 01/05/94] |
| | | |
| 3/10/94 | 14 | MEMORANDUM, OPINION, AND ORDER (ll) [Entry date 03/15/94] |
| | | |
| 3/14/94 | 15 | MINUTE ORDER of 3/14/94 by Hon. George M. Marovich : Pursuant to memorandum opinion dated 03/10/94, the order of the Bankruptcy Court is affirmed except that this Court reverses that part of the Bankruptcy Court's judgment that denied attorney's fees and costs to the defendants, and remands the case to the Bankruptcy Court to determine and impose attorney's fees and costs. terminating case Mailed notice (11) [Entry date 03/17/94] |
| | | |
| 3/24/94 | 16 | NOTICE OF APPEAL by Tasker Generes from motion minute order [15-2] ( Fee Paid); with Notice of filing and attachments. (pw) [Entry date 03/25/94] |
| | | |
| 3/24/94 | 16 | NOTICE by Tasker Generes regarding appeal [16-1]; with Notice of appeal and attachments. (pw) [Entry date 03/25/94] |
| | | |
| 3/24/95 | 17 | JURISDICTIONAL STATEMENT by Tasker Generes regarding appeal [16-1]; Notice of filing. (pw) [Entry date 03/25/94] |
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| 3/25/94 | – | TRANSMITTED: Short record on appeal to the 7th Circuit comprising of transmittal letter, copy of notice of appeal, Circuit Information Sheet, copy of jurisdictional statement, copy |

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| | | of order entered 03/14/94, and copy of docket entries. (pw) |
| | | |
| 3/25/94 | – | MAILED: Copies of notice of appeal, USCA 7th Circuit transcript information sheet, Rule 16(c) letter and docket entries to: Lynn D. Dowd. (pw) |
| | | |
| 3/30/94 | 18 | ACKNOWLEDGMENT of receipt of short record-on—appeal USCA 94-1647 (11) [Entry date 04/01/94] |
| | | |
| 4/15/94 | 19 | MINUTE ORDER of 4/15/94 - by Hon. George M. Marovich : Costs are taxed in favor of defendants and against plaintiff in the amount of $312.95. Mailed notice (11) [Entry date 04/18/94] |
| | | |
| 4/15/94 | 20 | BILL OF COSTS submitted (11) [Entry date 014/18/94] |
| | | |
| 4/15/94 | – | COSTS taxed for defendants Edward L Morrell, Patricia |
| | | Morrell in the amount of $ 312.95 against appellant Tasker |
| | | Generes (Attachments). (11) [Entry date 04/18/94] |

**DOCKET (PRINTED 01/25/96 AT 13:07)**
**GENERAL DOCKET**
**U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Nsuit: 0
94-1647
Generes, Tasker v. Morrell, Edward L.
Appeal from: United States District Court

bankruptcy - dc - none
Filed: 3/25/94
Fee status: paid

Prior cases:
None
Current cases:

Cross-appeal:

| Lead | Member | Start | End |
|---|---|---|---|
| 94-1647 | 94-2213 | 5/23/94 | |

**Lower Court Information**

Northern District of Illinois, Eastern Division: 93 C 5884 Court Reporter: Geraldine Monahan, Court Reporter Ordering Judge: George M. Marovich, Judge Date Filed: 9/27/93 Date order/judgment: 3/14/94 Date NOA filed: 3/24/94

**Caption**

IN THE MATTER OF :
DOROTHY GENERES,
DEBTOR
AND

TASKER GENERES,
Debtor - Appellant

**Counsel Information**

EDWARD L. MORRELL
Appellee

PATRICIA MORRELL
Appellee

Mark E. King.

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| TASKER GENERES<br>Debtor - Appellant | Christopher R. Smith<br>312/853-3230<br>Suite 1800<br>[COR LD NTC tr]<br>SMITH, WILLIAMS, & LODGE<br>55 W. Monroe Street<br>Chicago, IL 60603<br>USA<br>Lynn D. Dowd<br>312/ 634-1100<br>Suite 300<br>[COR LD NTC ret]<br>LEVIN, MCPARLAND, PHILLIPS,<br>LEYDIG & HABERKORN<br>180 N. Wacker Drive<br>Chicago, IL 60606<br>USA |

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| 3/25/94 | Bankruptcy case docketed. [94-1647] [588235-1] Appearance form due on 4/25/94 for Christopher R. Smith, for Lynn D. Dowd, for David B. Kahn. Transcript information sheet due 4/4/94 for Lynn D. Dowd, for Christopher R. Smith. Appellant's brief due 5/4/94 for Tasker Generes. (cfre) [94-1647] |
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| 3/25/94 | [94-1647] NOA from No. Dist. of Il., E. Div. due 4/7/94. (cfre) [94-1647] |
| | |
| 3/28/94 | Filed Appellant Tasker Generes jurisdictional statement. [94-1647] [S88262-1] (cfre) [94-1647] |
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| 3/28/94 | Added attorney Michael M. Tannen per appearance form. Appearance form filed for Appellant Tasker Generes by |

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| | attorney Lynn D. Dowd, Michael M. Tannen. [94-1647] [588235-1] (elea) [94-1647] |
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| 4/4/94 | Filed Seventh Circuit Transcript Information Sheet by Lynn D. Dowd for Appellant Tasker Generes. [94-1647] [588235-1] (jess) [94-1647] |
| | |
| 4/20/94 | Original record on appeal filed. Contents of record: 1 vol. pleadings;. [94-1647] [596456-1] (duda) [94-1647] |
| | |
| 4/21/94 | Added attorney Mark E. King per appearance form filed for Appellee Edward L. Morrell, Appellee Patricia Morrell by attorney Mark E. King, David B. Kahn [94-1647] [588235-1] (elea) [94-1647] |
| | |
| 4/28/94 | Filed motion by Appellant Tasker Generes to extend time to file appellant's brief. [599253-1] [94-1647] (jess) [94-1647] |
| | |
| 5/2/94 | ORDER issued GRANTING motion for extension of time to file appellant's brief. [599253-1] ak [94-1647] Appellant's brief due 6/13/94 for Tasker Generes . 2. The appellee(s) brief is due on or before 7/13/94 for Patricia Morrell, for Edward L. Morrell 3. The reply brief if any is due on 7/27/94 for Tasker Generes (jess) [94-1647] |
| | |
| 5/13/94 | Filed motion by attorney Lynn D. Dowd to withdraw as counsel for the Appellant Tasker Generes. [604428-1] [604428-1] [94-1647] (conw) [94-1647] |
| | |
| 5/16/94 | ORDER issued GRANTING motion to withdraw as counsel [604428-1] and attorney Lynn D. Dowd for Dorothy Generes, attorney Lynn D. Dowd for Tasker Generes may withdraw from further representation in this appeal. am [94-1647] Mr. Michael M. Tannen shall file the necessary appearance and certificate of interest by 5/23/94 if he has not already done so. (carl) [94-1647] |
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| 5/31/94 | ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition. Briefing shall proceed as follows: [588235-1] dw [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 6/13/94 for Tasker Generes in 94-1647 2. Appellee's in main apl. and A's br. in xap. due 7/13/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 3. Reply br. in main apl. and E's brief in xap. due 8/12/94 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 4. Reply brief, if any, on cross-appeal due 8/26/94 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 (jess) [94-1647 94-2213] |
| | |
| 6/6/94 | Filed joint motion by Appellant Tasker Generes in 94-1647, Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellee Tasker Generes in 94-2213, Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213, Appellee Dorothy Generes in 94-2213 to stay briefing schedule and jurisdictional statement and for prehearing conference. [611278-1] [94-1647, 94-2213] (conw) [94-1647 94-2213] |
| | |
| 6/7/94 | Original record on appeal filed. Contents of record: 1 vol. pleadings; . [94-2213] [611422-1] (lori) [94-2213] |
| | |
| 6/16/94 | Filed Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213 jurisdictional statement. [94-2213] [614476-1] (gina) [94-2213] |
| | |
| 6/22/94 | ORDER: The Court on its own motion filed ORDER to suspend briefing. [616339-1] Briefing is SUSPENDED pending a ruling on plaintiff Generes' motion for a prehearing conference. [611278-1] dw [94-1647, 94-2213] (jess) [94-1647 94-2213] |
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| 6/23/94 | ORDER issued GRANTING joint motion for a prehearing conference. The parties are ordered to meet with the court's Senior Staff Attorney, Donald J. Wall, on 7/7/94 at 9:30 |

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| | a.m. in the court's Auxiliary Courtroom to discuss settlement of these consolidated appeals. [611278-1] in 94-1647, 94-2213 dw [94-1647, 94-2213] (jess) [94-1647 94-2213] |
| | |
| 7/13/94 | ORDER: Counsel for the parties had a settlement conference with Donald J. Wall, Senior Staff Attorney for the Court. In the conference, the following matters were agreed to, and IT IS SO ORDERED: Briefing shall proceed as follows: [588235-1] dw [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 9/21/94 for Tasker Generes in 94-1647 2. Appellee's in main apl. and A's br. in xap. due 10/21/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 3. Reply br. in main apl. and E's brief in xap. due 11/21/94 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 4. Reply brief, if any, on cross-appeal due 12/5/94 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 (jess) [94-1647 94-2213] |
| | |
| 9/22/94 | Filed motion by attorney Michael M. Tannen in 94-1647, Michael M. Tannen in 94-2213 to withdraw as counsel for Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213, Appellee Dorothy Generes in 94-2213 [645510-1] [645510-1] [94-1647, 94-2213] tcarl) [94-1647 g4-2213] |
| | |
| 9/26/94 | ORDER issued GRANTING motion to withdraw as counsel [645510-1] and attorney Michael M. Tannen for Tasker Generes in 94-1647 may withdraw from further representation in this appeal in 94-1647, 94-2213. ak [94-1647, 94-2213] (patb) [94-1647 94-2213] |
| | |
| 9/26/94 | ORDER: Briefing shall proceed as follows: [607471-1] ak [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 10/24/94 for Tasker Generes in 94-1647. 2. Appellee's in main apl. and A's br. in xap. due 11/23/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for |

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| | Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. 3. Reply br. in main apl. and E's brief in xap. due 12/23/94 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213. 4. brief, if any, on cross-appeal due 1/6/95 for Patricia Morrell in 94-2213, for Edward L. (patb) [94-1647 94-2213] |
| | |
| 10/24/94 | Filed prose motion by Appellant Tasker Generes in 94-1647 to extend time to file appellant's brief on main appeal. [655756-1] [94-1647] (carl) [94-1647] |
| | |
| 11/2/94 | Filed Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213, opposition to Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 motion to extend time to file appellant's brief on main appeal. [659351-1] [94-1647, 94-2213] [659351-1] (patb) [94-1647 94-2213] |
| | |
| 11/3/94 | ORDER issued GRANTING motion for extension of time to file appellant's br on main appeal. [659351-1] ak [94-1647, 94-2213] 1. Appellant's brief on main appeal is due ll/25/94 for Tasker Generes in 94-1647 2. Appellee's in main apl. and A's br. in xap. due 12/27/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 3. Reply br. in main apl. and E's brief in xap. due 1/27/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 4. Reply brief, if any, on cross-appeal due 2/10/9S for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. Debtor-appellant is advised that no further extension of time will be allowed. (conw) [94-1647 94-2213] |
| | |
| 11/29/94 | Filed instanter motion by Appellant Tasker Generes in 94-1647 to file appellant's brief on main appeal. 15c plaintiff Tasker Generes' opening brief tendered. [94-1647] (patb) [94-1647] |
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| 11/29/94 | ORDER issued GRANTING instanter motion to file appellant's brief on main appeal. [670788-1] The clerk of this court is directed to file instanter the tendered copies of the opening brief of appellant Tasker Generes. [670788-1] AK [94-1647, 94-2213] 1. Appellee's in main apl. and Aps br. in xap. due 12/29/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. 2. Reply br. in main apl. and E's brief in xap. due 1/30/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213. 3. Reply brief, if any, on cross-appeal due 2/13/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. (patb) [94-1647 94-2213] |
| | |
| 11/29/94 | Filed 15c appellant's brief in main appeal by Tasker |
| | Generes in 94-1647, per order. [94-1647] [670792-1] (patb) |
| | [94-1647] |
| | |
| 11/29/94 | Filed l0c appendix by Appellant Tasker Generes in 94-1647, per order. [94-1647] [670793-1] (patb) [94-1647] |
| | |
| 11/29/94 | Added attorney Lynn D. Dowd per appearance form. Appearance form filed for Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 by attorney Lynn D. Dowd in 94-1647, Lynn D. Dowd in 94-2213. [94-1647, 94-2213] [607471-1] (jonp) [94-1647 94-2213] |
| | |
| 12/21/94 | Filed motion by Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213 to extend time to file appellee's, cross-appellant's brief. [676058-1] [94-1647, 94-2213] (patb) [94-1647 94-2213] |
| | |
| 12/21/94 | ORDER issued GRANTING motion for extension of time to file appellee's x-appellants brief. [676058-1] in 94-1647, 94-2213 AK [94-1647, 94-2213] 1 . Appellee's in main |

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| | apl. and A's br. in xap. due 1/13/95 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. 2. Reply br. in main apl. and E's brief in xap. due 2/13/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213. 3. Reply brief, if any, on cross-appeal due 2/27/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. (patb) [94-1647 94-2213] |
| | |
| 12/21/94 | Filed 15c appellee, cross-appellant's brief by Edward L. |
| | Morrell in 94-1647, Patricia Morrell in 94-1647, Edward L. |
| | Morrell, Patricia Morrell in 94-2213. [94-1647, |
| | 94-2213] [682900-1] (patb) [94-1647 94-2213] |
| | |
| 2/6/95 | Filed motion by Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 to extend time to file appellant's reply, cross-appellee's brief. [690852-1] [94-1647, 94-2213] (patb) [94-1647 94-2213] |
| | |
| 2/7/95 | ORDER issued GRANTING motion for extension of time to file a's reply,x-appellee's brief. [690852-1] in 94-1647, 94-2213 AK [94-1647, 94-2213] 1. Reply br. in main apl. and E's brief in xap. due 3/6/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 2. Reply brief, if any, on cross-appeal due 3/20/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 (jenp) [94-1647 94-2213] |
| | |
| 3/7/95 | Filed 15c reply brief in main appeal and cross-appellee's brief by Tasker Generes in 94-1647 and 94-2213. [94-1647, 94-2213] [703304-1] (juli) [94-1647 94-2213] |
| | |
| 3/20/95 | Filed 15c appellant's reply brief in cross-appeal by Patricia Morrell in 94-2213, Edward L. Morrell in 94-2213. [94-2213] [705299-1] (jenp) [94-2213] |
| | |
| 3/22/95 | ORDER: Argument set for Monday, April 17, 1995 at 2:00 |

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| | p.m. Each side limited to 15 minutes. [94-1647, 94-2213] [706240-1] (broo) [94-1647 94-2213] |
| | |
| 3/27/95 | NOTICE: Lynn D. Dowd for Appellant Tasker Generes, Appellant Tasker Generes, Dorothy Generes in 94-1647 will not be available for oral argument May 3 - 12, 1995. [94-1647, 94-2213] [607471-1] (broo) [94-1647 94-2213] |
| | |
| 4/6/95 | ORDER: Argument reset for Monday, April 17, 1995 at 11:00 a.m. Each side limited to 15 minutes. [94-1647, 94-2213] [711646-1] (broo) [94-1647 94-2213] |
| | |
| 4/17/95 | Case heard and taken under advisement by panel: Circuit Judge Walter J. Cummings, Circuit Judge John L. Coffey, Circuit Judge Frank H. Easterbrook. [94-1647, 94-2213] [715364-1] (broo) [94-1647 94-2213] |
| | |
| 4/17/95 | Case argued by Lynn D. Dowd for Appellant Tasker Generes, Appellant Tasker Generes, Dorothy Generes in 94-1647, Mark E. King for Appellee Patricia Morrell, Appellee Edward L. Morrell in 94-1647, Mark E. King for Appellant Edward L. Morrell, Appellant Patricia Morrell in 94-2213, Lynn D. Dowd for Appellee Tasker Generes in 94-2213 . [94-1647, 94-2213] [58@235-1] (broo) [94-1647 94-2213] |
| | |
| 7/25/95 | Filed oversized record in Section # 14 of exhibit room: 1 box containing assorted briefs. [607471-1] [94-1647, 94-2213] (cove) [94-1647 94-2213] |
| | |
| 10/16/95 | Filed Dorothy Generes in 94-1647, Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 Citation of Additional Authority, per CR 28(j). Dist. [94-1647, 94-2213] [770093-1] (patb) [94-1647 94-2213] |
| | |
| 11/3/95 | Filed opinion of the court by Judge Coffey. AFFIRMED as to 94-1647 and REVERSED as to 94-2213. Pursuant to Circuit Rule 38, we must provide reasonable notice to |

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| | counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Generes shall submit a response to the question of the amount of sanctions imposed to the clerk of this court within fifteen days of the date of this opinion. Counsel for the Morrells shall also submit to the clerk of this court within fifteen days an accounting of attorney's fees and cost incurred in this appeal. Circuit Judge Walter J. Cummings, Circuit Judge John L. Coffey, Circuit Judge Frank H. Easterbrook. [94-1647, 94-2213] [607471-1] (jimm) [94-1647 94-2213] |
| | |
| 11/3/95 | ORDER: Final judgment filed per opinion. With costs: y. [94-1647, 94-2213] [776165-1] (jimm) [94-1647 94-2213] |
| | |
| 11/3/95 | Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Generes shall submit a response to the question of the amount of sanctions imposed to the clerk of this court within fifteen days of the date of this opinion. [607471-1] [94-1647, 94-2213] Response due 11/20/95 for Christopher R. Smith in 94-1647, for Lynn D. Dowd in 94-1647, for Lynn D. Dowd in 94-2213, for Michael M. Tannen in 94-2213. (jimm) [94-1647 94-2213] |
| | |
| 11/3/95 | Counsel for the Morrells shall also submit to the clerk of this court within fifteen days an accounting of attorney's fees and cost incurred in this appeal. [607471-1] [94-1647, 94-2213] Statement in regards to the amount of sanctions due 11/20/95 for David B. Kahn and for Mark E. King in 94-1647 and 94-2213. (jimm) [94-1647 94-2213] |
| | |
| 11/17/95 | Filed Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellant Patricia Morrell in 94-2213, Appellant Edward L. Morrell in 94-2213 Bill of Costs in the amount of $ 226.21. [94-1647, 94-2213] [607471-1] (fran) [94-1647 94-2213] |
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| 11/17/95 | Filed David B. Kahn for Appellee Patricia Morrell, Appellee Edward L. Morrell in 94-1647, Mark E. King for Appellee Patricia Morrell, Appellee Edward L. Morrell in 94-1647, David B. Kahn for Appellant Edward L. Morrell, Appellant Patricia Morrell in 94-2213, Mark E. King for Appellant Edward L. Morrell, Appellant Patricia Morrell in 94-2213 statement regarding amount of sanctions due. [94-1647, 94-2213] [607471-1] (carl) [94-1647 94-2213] |
| | |
| 11/20/95 | Filed attorney(s) Lynn D. Dowd in 94-1647, Lynn D. Dowd in 94-2213 response to the court CR 38 notice. [588235-1] [94-1647, 94-2213] (carl) [94-1647 94-2213] |
| | |
| 11/20/95 | Added attorney Jerold S. Solovy and Laura A. Kaster per appearance form. Appearance form filed for Lynn Dowd, the attorney for appellant/cross-appellee Tasker Generes, for purposes of Rule 38 proceedings. Appearance form filed by attorneys Jerold S. Solovy and Laura A. Kaster. [94-1647, 94-2213] [690852-1] (jimm) [94-1647 94-2213] |
| | |
| | |
| 11/20/95 | Filed response regarding sanctions by appellant Tasker Generes in 94-1647 and 94-2213. [94-1647, 94-2213] [607471-1] (jimm) [94-1647 94-2213] |
| | |
| 11/27/95 | MANDATE ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $226.21. RECORD ON APPEAL TO BE RETURNED LATER. (Contents to be returned: 2 vol. pleadings; . ) [94-1647, 94-2213] [781295-1] (carl) [94-1647 94-2213] |
| | |
| 11/29/95 | Filed mandate receipt. [94-1647, 94-2213] [783319-1] (jame) [94-1647 94-2213] |
| | |
| 1/11/96 | ORDER re: STATEMENT REGARDING AMOUNT OF SANCTIONS DUE, filed on November 17, 1995, IT IS ORDERED that the appellees/cross-appellants supplement |

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| | the statement with an itemization of the specific billing that constitutes the $20,095 in attorney's fees. The supplement is due on or before January 22, 1996. AM [94-1647, 94-2213] Supplement due 1/22/96 for Patricia Morrell and Edward L. Morrell in 94-1647 and 94-2213. (jimm) [94-1647 94-2213] |
| | |
| 1/22/96 | Supplement to REQUEST FOR ATTORNEY'S FEES filed by Appellee Edward L. Morrell and Appellee Patricia Morrell in 94-1647 and 94-2213. [94-1647, 94-2213] [800496-1] (jimm) [94-1647 94-2213] |
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GENERAL DOCKET
U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT
MORRELL'S APPEAL.

Lower Court Information

Northern District of Illinois, Eastern Division: 93 C 5884
Ordering Judge: George M. Marovich, Judge
Court Reporter: Geraldine Monahan, Court Reporter
Date Filed: 9/27/93
Date order/judgment: 4/21/94
Date NOA filed: 5/20/94

Caption

IN THE MATTER OF:
DOROTHY GENERES,
Debtor

TASKER GENERES,
Debtor - Appellee

APPEAL OF: EDWARD L. MORRELL and PATRICIA MORRELL

Counsel Information

| | |
|---|---|
| EDWARD L. MORRELL | David B. Kahn |
| Appellant | 708/501-5083 |
| | Suite 100 |
| | [COR NTC ret] |
| | Mark E. King |
| | 708/501-5083 |
| | Suite 100 |
| | [COR LD NTC ret] |
| | KAHN & ASSOCIATES |
| | 1 Northfield Plaza |
| | |
| PATRICIA MORRELL | David B. Kahn |
| Appellant | 708/501-5083 |
| | Suite 100 |
| | [COR NTC ret] |
| | Mark E. King |
| | 708/501-5083 |
| | Suite 100 |
| | [COR LD NTC ret] |
| | KAHN & ASSOCIATES |
| | 1 Northfield Plaza |
| | Northfield, IL 60093 |
| v | USA |
| TASKER GENERES | Lynn D. Dowd |
| Debtor | 312/634 -1100 |
| | Suite 300 |
| | [COR LD NTC ret] |
| | LEVIN, MCPARLAND, PHILLIPS, |
| | LEYDIG & HABERKORN |
| | 180 N. Wacker Drive |
| | Chicago, IL 60606 |
| | USA |

SEVENTH CIRCUIT COURT OF APPEALS
**Docket 94-2213, Generes, Tasker, et al. v. Morrell, Edward L.**

| | |
|---|---|
| 5/23/94 | Bankruptcy case docketed. [94-2213] [588235-1] Appearance form due on 6/22/94 for David B. Kahn, for Mark E. King, for Christopher R. Smith. Transcript information sheet due 6/2/94 for David B. Kahn, for Mark E. King. Appellant' 9 brief due 7/5/94 for Edward L. Morrell, for Patricia Morrell. Jurisdictional statement due 5/27/94 for Edward L. Morrell, for Patricia Morrell. (carl) [94-2213] |
| | |
| 5/23/94 | [94-2213] NOA from No. Dist. of Il., E. Div. due 6/3/94. (carl) [94-2213] |
| | |
| 5/27/94 | Terminated attorney Christopher R. Smith for Tasker Generes in 94-2213 per appearance form filed by attorney Abraham Brustein. [94-2213] [588235-1] (chry) [94-2213] |
| | |
| 5/31/94 | ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition. Briefing shall proceed as follows: [588235-1] dw [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 6/13/94 for Tasker Generes in 94-1647 2. Appellee's in main apl. and A's br. in xap. due 7/13/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 3. Reply br. in main apl. and E's brief in xap. due 8/12/94 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 4. Reply brief, if any, on cross-appeal due 8/26/94 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 (jess) [94-1647 94-2213] |
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| 6/2/94 | ORDER: Appellant is directed to file the overdue jurisdictional statement to the clerk within 14 days from the date of this Rule to Show Cause. [588235-1] ak [94-2213] Jurisdictional statement due 6/16/94 for Patricia Morrell, for Edward L. Morrell . (fran) [94-2213] |
| | |
| 6/6/94 | Filed joint motion by Appellant Tasker Generes in 94-1647, Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellee Tasker Generes in 94-2213, Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213, Appellee Dorothy Generes in 94-2213 to stay briefing schedule and jurisdictional statement and for prehearing conference. [611278-1] [94-1647, 94-2213] (conw) [94-1647 94-2213] |
| | |
| 6/7/94 | Original record on appeal filed. Contents of record: 1 vol. pleadings; . [94-2213] [611422-1] (lori) [94-2213] |
| | |
| 6/9/94 | Appearance form filed by attorney(s) David B. Kahn in 94-2213, Mark E. King in 94-2213 for Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213. [94-2213] [607471-1] (cfre) [94-2213] |
| | |
| 6/16/94 | Filed Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213 jurisdictional statement. [94-2213] [614476-1] (gina) [94-2213] |
| | |
| 6/22/94 | ORDER: The Court on its own motion filed ORDER to suspend briefing. [616339-1] Briefing is SUSPENDED pending a ruling on plaintiff Generes' motion for a prehearing conference. [611278-1] dw [94-1647, 94-2213] (jess) [94-1647 94-2213] |
| | |
| 6/23/94 | ORDER issued GRANTING joint motion for a prehearing conference. The parties are ordered to meet |

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| | with the court's Senior Staff Attorney, Donald J. Wall, on 7/7/94 at 9:30 a.m. in the court's Auxiliary Courtroom to discuss settlement of these consolidated appeals. [611278-1] in 94-1647, 94-2213 dw [94-1647, 94-2213] (jess) [94-1647 94-2213] |
| | |
| 7/13/94 | ORDER: Counsel for the parties had a settlement conference with Donald J. Wall, Senior Staff Attorney for the Court. In the conference, the following matters were agreed to, and IT IS SO ORDERED: Briefing shall proceed as follows: [585235-1] dw [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 9/21/94 for Tasker Generes in 94-1647 2. Appellee's in main apl. and A's br. in xap. due 10/21/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 3. Reply br. in main apl. and E's brief in xap. due 11/21/94 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 4. Reply brief, if any, on cross-appeal due 12/5/94 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 (jess) [94-1647 94-2213] |
| | |
| 9/22/94 | Filed motion by attorney Michael M. Tannen in 94-1647, Michael M. Tannen in 94-2213 to withdraw as counsel for the Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213, Appellee Dorothy Generes in 94-2213 . [645510-1] [645510-1] [94-1647, 94-2213] (carl) [94-1647 94-2213] |
| | |
| 9/26/94 | ORDER issued GRANTING motion to withdraw as counsel [645510-1] and attorney Michael M. Tannen for Tasker Generes in 94-1647 may withdraw from further representation in this appeal in 94-1647, 94-2213. ak [94-1647, 94-2213] (patb) [94-1647 94-2213] |
| | |
| 9/26/94 | ORDER: Briefing shall proceed as follows: [607471-1] |

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| | ak [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 10/24/94 for Tasker Generes in 94-1647. 2. Appellee's in main apl. and A's br. in xap. due 11/23/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. 3. Reply br. in main apl. and E's brief in xap. due 12/23/94 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213. 4. brief, if any, on cross-appeal due 1/6/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. (patb) [94-1647 94-2213] |
| | |
| 10/24/94 | Filed prose motion by Appellant Tasker Generes in 94-1647 to extend time to file appellant's brief on main appeal. [655756-1] [94-1647] (carl) [94-1647] |
| | |
| 11/2/94 | Filed Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellant Edward L. Morrell in 94-2213, Appellant Patricia Morrell in 94-2213, opposition to Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 motion to extend time to file appellant's brief on main appeal. [659351-1] [94-1647, 94-2213] [659351-1] (patb) [94-1647 94-2213] |
| | |
| 11/3/94 | ORDER issued GRANTING motion for extension of time to file appellant's br on main appeal. [659351-1] ak [94-1647, 94-2213] 1. Appellant's brief on main appeal is due 11/25/94 for Tasker Generes in 94-1647 2. Appellee's in main apl. and A's br. in xap. due 12/27/94 for Patricia Morrell in 94-1647, for Bdward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 3. Reply br. in main apl. and E's brief in xap. due 1/27/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 4. Reply brief, if any. on cross-appeal due 2/10/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. Debtor-appellant is advised that no further extension of time will be allowed. (conw) [94-1647 94-2213] |

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| 11/29/94 | Filed instanter motion by Appellant Tasker Generes in 94-1647 to file appellant's brief on main appeal. 15c plaintiff Tasker Generes' opening brief tendered. [94-1647] (patb) [94-1647] |
| | |
| 11/29/94 | ORDER issued GRANTING instanter motion to file appellant's brief on main appeal. [670788-1] The clerk of this court is directed to file instanter the tendered copies of the opening brief of appellant Tasker Generes. [670788-1] AK |
| | [94-1647, 94-2213] 1. Appellee's in main apl. and A's br. in xap. due 12/29/94 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. 2. Reply br. in main apl. and E's brief in xap. due 1/30/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213. 3. Reply brief, if any, on cross-appeal due 2/13/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. (patb) |
| | [94-1647 94-2213] |
| | |
| 11/29/94 | Filed 15c appellant's brief in main appeal by Tasker Generes in 94-1647, per order. [94-1647] [670792-1] (patb) [94-1647] |
| | |
| 11/29/94 | Filed 10c appendix by Appellant Tasker Generes in 94-1647, per order. [94-1647] [670793-1] (patb) [94-1647] |
| | |
| 11/29/94 | Added attorney Lynn D. Dowd per appearance form. Appearance form filed for Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 by attorney Lynn D. Dowd in 94-1647, Lynn D. Dowd in 94-2213. [94-1647, 94-2213] [607471-1] (jonp) [94-1647 94-2213] |
| | |
| 12/21/94 | Filed motion by Appellee Edward L. Morrell in |

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| | 94-1647 Appellee Patricia Morrell in 94-1647, Appellant Edward L Morrell in 94-2213, Appellant Patricia Morrell in 94-2213 to extend time to file appellee's, cross-appellant's brief. [676058-1] [94-1647, 94-2213] (patb) [94-1647 94-2213] |
| | |
| 12/21/94 | ORDER issued GRANTING motion for extension of time to file appellee's x-appellants brief. [676058-1] in 94-1647, 94-2213 AK [94-1647, 94-2213] 1. Appellee's in main apl. and A's br. in xap. due 1/13/95 for Patricia Morrell in 94-1647, for Edward L. Morrell in 94-1647, for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. 2. Reply br. in main apl. and E's brief in xap. due 2/13/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213. 3. Reply brief, if any, on cross-appeal due 2/27/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213. (patb) [94-1647 94-2213] |
| | |
| 1/13/95 | Filed 15c appellee, cross-appellant's brief by Edward L. Morrell in 94-1647, Patricia Morrell in 94-1647, Edward L. Morrell in 94-2213, Patricia Morrell in 94-2213. [94-1647, 94-2213] [682900-1] (patb) [94-1647 94-2213] |
| | |
| 2/6/95 | Filed motion by Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 to extend time to file appellant's reply, cross-appellee's brief. [690852-1] [94-1647, 94-2213] (patb) [94-1647 94-2213] |
| | |
| 2/7/95 | ORDER issued GRANTING motion for extension of time to file a's reply,x-appellee's brief. [690B52-1] in 94-1647, 94-2213 AK [94-1647, 94-2213] 1. Reply br. in main apl. and E's brief in xap. due 3/6/95 for Tasker Generes in 94-1647, for Tasker Generes in 94-2213 2. Reply brief, any, on cross-appeal due 3/20/95 for Patricia Morrell in 94-2213, for Edward L. Morrell in 94-2213 (jenp) [94-1647 94-2213] |
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| 3/7/95 | Filed 15c reply brief in main appeal and cross-appellee's brief by Tasker Generes in 94-1647 and 94-2213. [94-1647, 94-2213] [703304-l] (juli) [94-1647 94-2213] |
| | |
| 3/20/95 | Filed 15c appellant's reply brief in cross-appeal by Patricia Morrell in 94-2213, Edward L. Morrell in 94-2213. [94-2213] [705299-l] (jenp) [94-2213] |
| | |
| 3/22/95 | ORDER: Argument set for Monday, April 17, 1995 at 2:00 p.m. Each side limited to 15 minutes. [94-1647, 94-2213] [706240-1] (broo) [94-1647 94-2213] |
| | |
| 3/27/95 | NOTICE: Lynn D. Dowd for Appellant Tasker Generes, Appellant Tasker Generes, Dorothy Generes in 94-1647 will not be available for oral argument May 3 - 12, 1995. [94-1647, 94-2213] [607471-1] (broo) [94-1647 94-2213] |
| | |
| 4/6/95 | ORDER: Argument reset for Monday, April 17, 1995 at 11:00 a.m. Each side limited to 15 minutes. [94-1647, 94-2213] [711646-1] (broo) [94-1647 94-2213] |
| | |
| 4/17/95 | Case heard and taken under advisement by panel: Circuit Judge Walter J. Cummings, Circuit Judge John L. Coffey Circuit Judge Frank H. Easterbrook. [94-1647, 94-2213] [715364-1] (broo) [94-1647 94-2213] |
| | |
| 4/17/95 | Case argued by Lynn D. Dowd for Appellant Tasker Generes, Appellant Tasker Generes, Dorothy Generes in 94-1647, Mark E. King for Appellee Patricia Morrell, Appellee Edward L. Morrell in 94-1647, Mark E. King for Appellant Edward L. Morrell, Appellant Patricia Morrell in 94-2213, Lynn D. Dowd for Appellee Tasker Generes in 94-2213 . [94-1647, 94-2213] [588235-1] (broo) [94-1647 94-2213] |

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| | |
| 7/25/95 | Filed oversized record in Section # 14 of exhibit room: 1 box containing assorted briefs. [607471-1] [94-1647, 94-2213] (cove) [94-1647 94-2213] |
| | |
| 10/16/95 | Filed Dorothy Generes in 94-1647, Appellant Tasker Generes in 94-1647, Appellee Tasker Generes in 94-2213 Citation of Additional Authority, per CR 28(j). Dist. [94-1647, 94-2213] [770093-1] (patb) [94-1647 94-2213] |
| | |
| 10/16/95 | Filed opinion of the court by Judge Coffey. AFFIRMED as to 94-1647 and REVERSED as to 94-2213. Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Generes shall submit a response to the question of the amount of sanctions imposed to the clerk of this court within fifteen days of the date of this opinion. Counsel for the Morrells shall also submit to the clerk of this court within fifteen days an accounting of attorney's fees and cost incurred in this appeal. Circuit Judge Walter J. Cummings, Circuit Judge John L. Coffey, Circuit Judge Frank H. Easterbrook. [94-1647, 94-2213] [607471-1] (jimm) [94-1647 94-2213] |
| | |
| 11/3/95 | ORDER: Final judgment filed per opinion. With costs: y. [94-1647, 94-2213] [776165-l] (jimm) [94-1647 94-2213] |
| | |
| 11/3/95 | Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Generes shall submit a response to the question of the amount of sanctions imposed to the clerk of this court within fifteen days of the date of this opinion. [607471-1] [94-1647, 94-2213] Response due 11/20/95 for Christopher R. Smith in 94-1647, for Lynn D. Dowd |

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| | in 94-1647, for Lynn D. Dowd in 94-2213, for Michael M. Tannen in 94-2213. (jimm) [94-1647 94-2213] |
| | |
| 11/3/95 | Counsel for the Morrells shall also submit to the clerk of this court within fifteen days an accounting of attorney's fees and cost incurred in this appeal. [607471-l] [94-1647, 94-2213] Statement in regards to the amount of sanctions due ll/20/95 for David B. Kahn and for Mark E. King in 94-1647 and 94-2213. (jimm) [94-1647 94-2213] |
| | |
| 11/17/95 | Filed Appellee Edward L. Morrell in 94-1647, Appellee Patricia Morrell in 94-1647, Appellant Patricia Morrell in 94-2213, Appellant Edward L. Morrell in 94-2213 Bill of Costs in the amount of $ 226.21. [94-1647, 94-2213] [607471-l] (fran) [94-1647 94-2213] |
| | |
| 11/17/95 | Filed David B. Kahn for Appellee Patricia Morrell, Appellee Edward L. Morrell in 94-1647, Mark E. King for Appellee Patricia Morrell, Appellee Edward L. Morrell in 94-1647, David B. Kahn for Appellant Edward L. Morrell, Appellant Patricia Morrell in 94-2213, Mark E. King for Appellant Edward L. Morrell, Appellant Patricia Morrell in 94-2213 statement regarding amount of sanctions due. [94-1647, 94-2213] [607471-1] (carl) [94-1647 94-2213] |
| | |
| 11/20/95 | Filed attorney(s) Lynn D. Dowd in 94-1647, Lynn D. Dowd in 94-2213 response to the court CR 38 notice. [588235-1] [94-1647, 94-2213] (carl) [94-1647 94-2213] |
| | |
| 11/20/95 | Added attorney Jerold S. Solovy and Laura A. Kaster per appearance form. Appearance form filed for Lynn Dowd, the attorney for appellant/cross-appellee Tasker Generes, for purposes of Rule 38 proceedings. Appearance form filed by attorneys Jerold S. Solovy and Laura A. Kaster. [94-1647, 94-2213] [690852-1] (jimm) [94-1647 94-2213] |

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| | |
| 11/20/95 | Filed response regarding sanctions by appellant Tasker Generes in 94-1647 and 94-2213. [94-1647, 94-2213] [607471-1] (jimm) [94-1647 94-2213] |
| | |
| 11/75/95 | MANDATE ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $226.21. RECORD ON APPEAL TO BE RETURNED LATER. (Contents to be returned: 2 vol. pleadings; . ) [94-1647, 94-2213] [781295-1] (carl) [94-1647 94-2213] |
| | |
| 11/29/95 | Filed mandate receipt. [94-1647, 94-2213] [783319-1] (jame) [94-1647 94-2213] |
| | |
| 1/11/96 | ORDER re: STATEMENT REGARDING AMOUNT OF SANCTIONS DUE, filed on November 17, 1995, IT IS ORDERED that the appellees/cross-appellants supplement the statement with an itemization of the specific billing that constitutes the $20,095 in attorney's fees. The supplement is due on or before January 22, 1996. AM [94-1647, 94-2213] Supplement due 1/22/96 for Patricia Morrell and Edward L. Morrell in 94-1647 and 94-2213. (jimm) [94-1647 94-2213] |
| | |
| 1/22/96 | Supplement to REQUEST FOR ATTORNEY'S FEES filed by Appellee Edward L. Morrell and Appellee Patricia Morrell in 94-1647 and 94-2213. [94-1647, 94-2213] [800496-1] (jimm) [94-1647 94-2213] |
| | |

## V.

## CONSTITUTION, STATUTES and RULES

### U.S. Constitution: Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
## PART IV.
## JURISDICTION AND VENUE
## CHAPTER 81. SUPREME COURT

### 28 USCS §1254 (1995)

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

### 28 USCS §1291 (1995)

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the
Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [ 28 USCS §§ 1292(c), (d), 1295].

## TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
## PART V. PROCEDURE
## CHAPTER 131. RULES OF COURTS
### 28 USCS § 2072 (1995)

§2072. **Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States

district courts (including proceedings before magistrates thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

§2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting. (2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed

rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.

§2074. Rules of procedure and evidence; submission to Congress; effective date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 [ 28 USCS §2072] is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

§ 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11 [ 11 USCS §§ 1 et seq.].

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

## Federal Rules of Appellate Procedure

### Rule 38.

### Damages and Costs for Frivolous Appeals.

If a court of appeals determines that an appeal is frivolous, it may , after a separately filed motion or notice the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

## Federal Rules of Civil Procedure

### Rule 1. Scope and Purpose of Rules

These rule govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and in expensive determination of every action.
(As amended Dec. 29, 1984, eff. Oct. 20 1949; Feb. 28,1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993.)

## Federal Rule Civil Procedure
## Rule 11 Post the 1993 Amendment

### Rule 11. Signing of Pleadings , Motions, and Other Papers; Representations to Court; Sanctions.

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or,
if the party is not represented by an attorney, shall be signed by the party . Each paper shall state the signer's address and telephone number , if any. Except when otherwise specifically provided by rule or statute. pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing filling, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, an other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or,
if specifically so identified are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery, and

(4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, jars reasonably based on a ; auk of information or belief.

(c) Sanction. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b0 or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) . *it shall be served as provided in rule 5, but shall not be filed with or presented to the court unless within 21 days after service of the motion ( or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable* expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violation committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), an sanction may consist of, or include, directives of a non monetary nature, an order o pay a penalty into court ,or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b) (2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

## Federal Rule Civil Procedure
## Rule 11 Before the 1993 Amendment

**Rule 11. Signing of pleadings, Motion, and Other papers; Sanctions.** Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A
party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or one witness sustained by corroborating constitutes a certificate by the signer that the signer has read the pleading motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or
needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filling of the pleading, motion or other paper, including a reasonable attorney's fee.

## Federal Rule of Civil Procedure
## Rule 52.
## Finding by the Court; Judgment on Partial Findings.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of
its action. Requests for findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The finding of a master, to the extent that the court adopts them , shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Finding of fact and conclusion of law are unnecessary on decision of motions under rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

( Amended by order adopted December 27, 1946, effective March 19, 1948, by order adopted January 21, 1963, effective July 1, 1963, by order adopted April 28, 1983, effective August 1, 1983, by order adopted April 29, 1985, effective August 1, 1985, and by order adopted April 30, 1991, effective December 1, 1991.)

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to rule 59 . when finding of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the finding a may thereafter be raised whether or not the party raising the question has made in the district court an objection to such finding a or has made a motion to amend them
or a motion for judgment.

(c) Judgment on Partial findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable findings on that issue,, or the court may decline to render any judgment until the close of all the evidence.

Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

**Federal Rule of Civil Procedure**
**Rule 54(d) Costs; Attorney's Fees.**

(d) Costs Other than Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees. (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B). Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions

of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter. (E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

## Adversary Proceeding's
## Bankruptcy Rules
## Rule 7001
## Scope of Rules of Part VII Adversary Proceedings.

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to §363(h) for the sales of property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a Chapter 11 or Chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. §1452.

## Bankruptcy Rule 7002
## References to Federal Rules of Civil Procedure.

Whenever a Federal Rule of Civil Procedure applicable to adversary proceedings makes reference to another Federal Rule of Civil Procedure, the reference shall be read as a reference to the Federal Rule of Civil Procedure as modified in this Part VII.

## Bankruptcy Rule 7052.
## Findings by the Court

Rule 52 F. R. Civ. P. applies in adversary proceedings.

## Bankruptcy Rule 7054

(a) **Judgments.** Rules 54(a)-(c) F.R.Civ.P. applies in adversary proceedings.

(b) **Costs**. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice; on motion served within five days thereafter, the action of the clerk may be reviewed by the court.

## PART VIII
## APPEALS TO DISTRICT COURT

### Rule 8013.
### Disposition of Appeal ;
### Weight Accorded Bankruptcy Judge's Findings of Fact

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

### Bankruptcy Rule 8014.
### Costs

Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel , cost shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court. Cost incurred in the production of copies of briefs, the appendices, and the record and in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the notice of appeal shall be taxed by the clerk as cost of the appeal in favor of the party entitled to cost under this rule.

### Bankruptcy Rule 8018(b)
### Procedure When There is No Controlling Law.

A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the circuit council or district court. No sanction or other

disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

**Bankruptcy Rule 9011**

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, statement of intention, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for either extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) Verification. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. §1746 satisfies the requirement of verification.

(c) Copies of Signed or Verified Papers. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

## EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
952049 JUN 18 1996
OFFICE OF THE CLERK

(6)

No.__

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM,1995

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

# APPENDIX "D" TO PETITION FOR WRIT OF CERTIORARI

I. Bankruptcy Order Confirming Generes' Plan and Plan
II. Morrells attorney's time records for Adversary.
III. Generes' attorney's time records for Adversary.
IV. Petition for Rehearing.

Tasker O de Generes
Counsel of Record
1845 Happ Road,
Northbrook, IL 60062-5643
(847) 564-8944
June 19, 1996

34 pp

## I. CONFIRMATION ORDER WITH REORGANIZATION PLAN

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: | ) | |
| TASKER GENERES and | ) | |
| DOROTHY GENERES, | ) | 91 B-17220 |
| Joint Debtors. | ) | Chapter 11 |
| | ) | Judge Coar |

**ORDER CONFIRMING PLAN OF REORGANIZATION**

This cause coming to be heard for hearing on confirmation of the Debtors' Plan of Reorganization: The debtors having filed their third amended plan of reorganization under Chapter 11 of the bankruptcy code on October 15,1992, a copy of which was transmitted to creditors and all equity security holders on October 26, 1992;

The Court finding that except for the Federal Deposit Insurance Corporation ("'FDIC") all classes of creditors and equity security holders entitled to vote on the plan have previously filed acceptances of the third amended plan of reorganization: The debtors having filed fourth amended plan of reorganization on June 25,1993 and a fifth amended plan of reorganization on June 29, 1993, copies of which have been transmitted to creditors and equity security holders; The FDIC, pursuant to the oral representations of counsel made in open court, having consent to and accepted the provisions of the filth amended plan of reorganization:

The Court determining the provisions of the fourth amended plan of reorganization and the fifth amended plan of reorganization improves the treatment of Deerfield Federal Savings and Loan, The Federation of Financial Institutions (successor in interest to Labe Federal) and Merrill Lynch Equity Management Inc., all of whom had previously voted to accept the provisions the third amended plan of reorganization; The FDIC having withdrawn its previously filed objection to the third amended plan of reorganization; It having been determined after hearing on notice

that the requirements of confirmation set forth in 11 U.S.C. Section 1129(a) have been satisfied:

It is hereby ordered: The fifth amended plan of reorganization filed by the debtors on June 29,1993 is hereby confirmed. A copy of the confirmed plan is attached to this order.

ENTERED
June 30, 1993
DAVID COAR
Bankruptcy Judge

Abraham Brustein ARDC# 06201953
Christopher R. Smith ARDC# 00327662
Xerox Centre1 Suite 1800
SMITH WILLIAMS & LODGE CHARTERED
55 West Monroe Street Chicago, Illinois 60603

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

| | | |
|---|---|---|
| IN RE: | ) | |
| TASKER GENERES & | ) | 91 B 17220 |
| DOROTHY GENERES | ) | Chapter 11 |
| Joint Debtors. | ) | Judge Coar |
| | ) | |

## DEBTORS' FIFTH AMENDED PLAN OF REORGANIZATION

**June 29, 1993**

Tasker Generes and Dorothy Generes, the Debtors and Debtors in Possession in the above captioned Chapter 11 case, propose the following plan of reorganization, the Debtors' Fifth Amended Plan of Reorganization, pursuant to Section 1121 (a) of the Bankruptcy Code.

The Debtors' Fifth Amended Plan of Reorganization is identical to the Debtor's Fourth Amended Plan of Reorganization except that additions have been made to Article IV, treatment of claims not impaired under the Plan. Article IV still provides for

payment in full at or before the effective date of the Plan out of the proceeds of the Citibank loan, but also provides for an alternative manner of payment in the unlikely event that the Citibank transaction is not completed. The alternative manner of payment is entirely consistent with the Debtor's Third Amended Plan of Reorganization, except with respect to the Federal Deposit insurance Corporation "FDIC"). In the event the Citibank Loan Transaction is not completed, the FDIC will be paid in accordance with an agreement it reached with the Debtors in Possession as described in section 4.05 herein the Fifth Amended Plan and the Debtors' motion for authority to obtain credit.

## INTRODUCTION

On August 14,1991. Tasker Generes and Dorothy Generes filed their voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Since the filing of their petition, they have remained in possession of their assets and have operated their affairs as debtor in possession in accordance with Sections 1107 and 1108 of the Bankruptcy code. This plan of reorganization is submitted for the purpose of paying all claims that existed as of the date of the filing of the bankruptcy case, and post-petition administrative claims.

## ARTICLE I
### Definitions

The definitions and rules of construction set forth in Sections 101 and 102 of the Bankruptcy Code shall apply when terms defined or construed in those sections are used in this plan. Those definitions and rules of construction shall be supplemented by the following definitions: [omitted as immaterial]

## ARTICLE II
### Classification of Claims

Claims shall be classified and divided into the following classes:

2.01 Administrative Claims - Class I Claims: Class I claims shall consist of all allowed claims entitled to priority under Section 507(a)(1) of the Bankruptcy Code, including (1) all administrative expenses incurred during the debtor's chapter 11 case and (2) all professional fees and expenses incurred in connection with the chapter 11 case.

2.02 Claims of Governmental Units - Class II Claims: Class II claims shall consist of all allowed unsecured claims of a governmental unit, agency or body, entitled to priority under Section 507(a) (7) of the Bankruptcy Code.

2.03 Other Priority Unsecured Claims - Class III claims: Class III claims shall consist of all allowed unsecured claims entitled to priority under Section 507(a) of the Bankruptcy Code other than administrative claims and claims held by governmental units. This class includes allowed unsecured claims entitled to priority under Sections 507(a)(3), 507(a)(4), 507(a)(5) and 507(a)(6) of the Bankruptcy Code.

2.04 Unsecured Claims Without Priority - Class IV Claims: Class IV claims shall consist of all unsecured claims without priority.

2.05 Labe Claim - Class V Claim: Class V shall consist of the allowed secured claim of Labe, as evidenced by its promissory note, mortgage and assignment of rents, dated August 13, 1971.

2.06 Deerfield Claim - Class VI Claim: Class VI shall consist of the allowed secured claim of Deerfield, as evidenced by its promissory note and mortgage, dated May 5, 1979.

2.07 Merrill Lynch Claim - Class VII Claim: Class VII shall consist of the allowed secured claim of Merrill Lynch, as evidenced by its promissory note and mortgage dated October 11, 1988.

2.08 Class VIII Claim: The Class VIII claim shall consist of the allowed claim of the FDIC in the amount of $234,498.56 as of May 1,1993, plus interest as provided in Section 4.05 of this Plan.

## ARTICLE III

### Treatment of Administrative Claims, Claims of Governmental Units, and other Priority Claims

The treatment afforded to holders of Class I and Class II and Class III claims is set forth below:

3.01 Treatment of Class I Claims: Class I claims, other than the claims of professional persons employed under Section 327 of the Bankruptcy Code, shall be paid in cash on the effective date of the plan. Class I Claims of professional persons employed under Section 327 of the Bankruptcy Code shall be paid upon entry of a final order allowing such claims or as soon thereafter as practicable.

3.02 Treatment of Class II Claims: Class II claims shall be paid In full, in cash, on the effective date of the plan.

3.03 Treatment of Class III Claims: the Class III claims shall be paid, in full, in cash, on the effective date of the plan.

## ARTICLE IV

### Treatment of Claims Not Impaired Under the Plan

The Class IV, V, VI, VII and VIII claims are not impaired under the Plan.

4.01 Treatment of Class IV Claims: The Class IV which consists of unsecured claims without any priority, shall not be impaired under the Plan. The Class IV Claims will be paid in full, in cash, on the later of the effective date of the Plan or the thirtieth day following the final order allowing the claim.

[Class IV is the Morrell claim. The remainder of Article IV deals with claims already paid and so is omitted.]

## ARTICLE V

Treatment of Claims Impaired Under the Plan

5.1 There are no claims that are impaired under the Plan.

## ARTICLE VI

Funding and Execution of the Plan

[Loan was obtained from Citibank and all claims except Morrells' paid, so details of this section are omitted]

## ARTICLE VII

Confirmation

7.01 Except as otherwise provided in the Plan, upon confirmation of the Plan, the debts of the Debtors shall be discharged as provided for in Section 1141 of the Bankruptcy Code. The terms of the confirmed plan shall be binding upon all holders of claims against the Debtors, whether or not the holder is impaired under the Plan, and whether or not the holder has voted upon or accepted the Plan.

7.02 Except as otherwise provided in the Plan or the confirmation order, all property of the estate, including any and all causes of action, shall be revested in the reorganized Debtors on the effective date of the Plan, subject to any obligations secured by the property, and subject to the provisions of the Plan.

7.03 The Bankruptcy Code contains provisions which permit the Court to confirm a plan of reorganization, even if the plan is not accepted by all impaired classes, so long as at least one impaired class of claims does accept the plan and other legal requirements are met. The provisions for confirming a plan without the acceptance of all impaired classes are found in Section 1129(b) of the Bankruptcy Code. The Debtors believe that their plan meets the minimum legal requirements necessary to comply with Section 1129 (b) if one impaired class votes to accept the plan. Therefore, they may seek confirmation of their plan pursuant to Section 1129 (b) if the plan is not accepted by each class of impaired claims.

## ARTICLE VIII-IX

[Executory Contracts and Modification omitted as irrelevant]

## ARTICLE X

Retention of Jurisdiction by the Bankruptcy Court

10.01 Subsequent to the entry of the order confirming the plan, the Bankruptcy Court shall continue to maintain jurisdiction over this case for the following purpose:

(a) To determine any disputed claims;

(b) To determine requests for payment of claims entitled to priority under Section 507(a)(1) of the Bankruptcy Code, including compensation or reimbursement of expenses to parties entitled to make such claims;

(c) To resolve controversies and disputes regarding interpretation and implementation Of the plan:

(d) To determine the extent, priority and validity of any lien or interest asserted by any party against property of the estate;

(e) To determine any and all motions, applications, claims disputes, adversary proceedings, or litigated matters pending on the effective date of the Plan or filed within the time limits set by the Bankruptcy Code or an order of the Bankruptcy Court;

(f) Issuing any order necessary in aid to the implementation of the plan or the order of confirmation;

(g) Hearing and determining matters rising in connection with the filing of reports required under the Bankruptcy Code and the Bankruptcy Rules and the conclusion and termination of this chapter 11 case.

10.02 Provided, however, that the Court may refuse to exercise its retained jurisdiction as to any of the foregoing.

Article XI

## Disputed Claims

11.01. Any objection to a claim must be filed within the deadline which will be set by the Bankruptcy Court. Any objection which is timely filed shall be adjudicated or determined in accordance with the procedures set forth in the Bankruptcy Code and Bankruptcy Rules. The Debtors have filed an objection to the claim of Edward and Patricia Morrell.

## ARTICLE XII
## Miscellaneous Provisions

12.1 No disbursing Agent: The Debtors shall act as their own disbursing agent and shall be responsible for making all of the payments required under the Plan.

by:_____
Christopher R. Smith,
one of the attorneys for
Tasker Generes and Dorothy Generes

ARDC# 00327662
Xerox Centre Suite 1800
SMITH WILLIAMS & LODGE CHARTERED
55 West Monroe Street Chicago, Illinois 60603

II.

**Generes's Attorney's Time Records from Bankruptcy Fee From First and Final Application of Smith Williams & Lodge, chartered for Allowance of Compensation for Profesional Services Rendered as Attorneys for the Debtors filed August 12, 1993.**

**EXHIBIT G**

**MORRELL CLAIM AND ADVERSARY**

| Date/ attorney | Subject | Hours |
|---|---|---|
| 08/13/92 AB | Conference with client regarding Morrell Suit | 0.5 |
| 08/28/92 AB | Edit Morrell claim objection: telephone conference with Tasker Generes regarding same | 0.5 |
| 08//29/92 AB | Complaint drafting of Morrell claim objection and counterclaim for damges | 1 |
| 09/10/92 AB | Edit Morrell complaint | 0.4 |
| 10/20/92 AB | Telephone Conference with client re: Morrell adversary | 0.2 |
| 11/03/92 CRS | Court Appearance on status on Morrell adversary | 0.7 |
| 11/04/92 CRS | Draft Correspondence to clients regarding Morrell adversary status | 0.3 |
| 12/15/92 AB | Telephone conference with Mark King regarding Morrell adversary | 0.3 |
| 12/29/92 CRS | Telephone conferecne with Generes and King regarding discovery. Draft correspondence to King regarding discovery agreement | 1 |
| 12/31/92 CRS | Draft correspondence to Mark King regarding discovery schedule agreement. | 0.75 |

| | | |
|---|---|---|
| 01/06/93<br>CRS | Draft coreespondence to King regarding settlement offer. | 1.0 |
| CRS | Telephone conference with King regarding settlement proposal | .2 |
| JA | Legal Research-regarding holdover tenancy | 2.25 |
| 01/11/93<br>AB | Preparation for and deposition of Patricia and Edward Morrell | 3 |
| 01/12/93<br>AB | Conference with J.A. regarding legal issues regarding Morrell complaint | 0.3 |
| 01/14/93<br>JA | Legal Research-regarding holdover provisions in lease and holdover when there is no lease provision; preparation of memo to AB | 3 |
| 01/16/93<br>AB | Preparation deposition subpoena and notice regarding Farmers Insurance; letter to King regarding Farmers Insurance. | 1 |
| 01/19/93<br>AB | Edit discovery re: Farmers Insurance Group | 0.8 |
| 01/20/93<br>TJC | arranged for service of process on Farmer's Insurance | 0.2 |
| 01/21/93<br>RLS | Conference with A. Brustein re: attending T. Generes' deposition | 0.2 |
| 01/25/93<br>AB | Telephone conference with attorney for Farmers Insurance | 0.2 |
| RLS | Review File in preparation of Tasker's deposition. Telephone conference with M. King | .5 |
| | Conference with Tasker re: his deposition testimony. | .5' |
| | Attendence at deposition of Tasker | 5.5 |
| 01/28/93<br>AB | Mark King regarding status of discovery and possible settlement | 0.2 |

| | | |
|---|---|---|
| 02/06/93<br>RLS | Draft correspondence regarding possible settling Morrell case | 0.25 |
| 02/11/93<br>RLS<br>RLS | Telephone conference with Generes regarding settlement<br>Draft correspondence to court reporters regarding obtaining Tasker's deposition | 0.2<br>.3 |
| 02/24/93<br>RLS | Draft correspondenct to Tasker re: reviewing his deposition transcript | 0.3 |
| 03/06/93<br>RLS | Review of Morrell's proposed joint motion to continue scheduling of adversary matter. | 0.2 |
| 03/12/93<br>CRS | Court Appearance on motion to amend pretrial schedule | 1 |
| 03/22/93<br>RLS | Telephone conference with M.King re Judge Coars's order re: pre-trial schedule | 0.2 |
| 6/16/93<br>RLS<br>RLS | Prepartion of trial witness list and exhibits.<br>Review and revise pre-trial list.<br>Telephone conference with M.King regarding our settlement offer. | 1<br><br>.5 |
| 06/18/93<br>RLS | Telephone conference with M.King regarding exhanging witness list. | 0.5 |
| 06/21/93<br>RLS | Preparation of proposed findings of facts and conclusions of law | 1.5 |
| 06/22/93<br>RLS | Review and revise proposed findings of fact and conclusion of law<br>Preparation of stipulation as to certain facts and documents<br>Review and revise defendants exhibits | 1.5<br><br>.25 |
| 06/23/93<br>RLS | Review of defendant's proposed findings of fact and law<br>Preparation of finding and conclusion of law, and cover letter to Judge Coar.<br>Telephone conference with Tasker | 2.75 |

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| 6/24/93 RLS | Telephone conference with McCorkle Court Reporters ordered Morrell's deps and reviewed Tasker's deposition | 2 |
| TJC | Conference with RLS regarding proper service of option. Legal Research -regarding same | 1.5 |
| 06/28/93 RLS | Review File in preparation for trial | 3 |
| 06/29/93 RLS | Preparation of direct examination of Tasker. Reviewed dep. transcripts of TG and the Morrells as well as all pleadings. Telephone conference with Tasker regarding strategy. Conference with AB regarding strategy | 4.5 |
| 06/30/93 RLS | Review of file and final preparation before trial and Trial of Adversary matter before Judge Coar | 7 |
| 07/19/93 AB | Draft correspondence to client re: timing for filing post trial motion or notice of appeal | 0.6 |
| 07/23/93 AB | Telephone conference with client re filing of post trial motion | 0.2 |

| Attorney | Hours | Rate | FEE |
|---|---|---|---|
| AB Abraham Brustein | 9.5 | $175.00 | 1,662.5 |
| CRS Christopher Smith | 6.15 | $125.00 | 768.75 |
| RLS Ron Sandack | 31.15 | $125.00 | 3,893.75 |
| TJC Tom Cunnigham | 1.7 | $75.00 | 127.5 |

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| JA<br>John Ayanian | 5.25 | $75.00 | 393.75 |
| **Total:** | **53.75** | | **$6,846.25** |

Mr. Sandack was principally responsible for conducting the Morrell litigation. He completed discovery, prepared pre-trial materials and presented the case at trial. He is a 1989 graduate of DePaul University College of Law and was admitted to practice in October 1989. He has been associated with Smith Williams and Lodge since December 1990.

III.

**Morrells' Attorney's Affidavit, Mark E. King, on Morrell Lease Dispute with Generes: Fee Petition to Bankruptcy Judge:**

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| Date | Subject | Hours |
|---|---|---|
| 01/06/93 | Phone call with client re: upcoming depsitions. Phone call with plaintiff's attorney Chris Smith re: same and document production in the case. | 0.3 |
| 01/08/93 | Phone call with Chris Smith re: depositions. Prepartion for same. Review of documents for same and phone call with client re: same | 1:06 |
| 01/11/93 | Preparation of clients for deposition and defended their depositions. Letter to clinets re: missing documents and information still needed. Letter to plaintiff's attorney Abe Brustein re: documents produced. Conference with David B. Kahn ("DBK") re: foregoing | 5:00 |
| 01/20/93 | Review of subpoena and letter from Generes' attorney. | 0:12 |
| 01/22/93 | Phone call with client re: additional information requested by plaintiff. letter to Geners' counsel re: same. Prepartion for Generes' deposition | 1:06 |
| 01/25/96 | Preparation for Generes' deposition. Conference with client re: same | 6:48 |
| 01/28/93 | Letter to Brustein re: additional discovery. Phone call with Brustein re: possible settlemtn. | 1:00 |
| 02/18/93 | Phone call with Brustein re: schedule | 0:06 |
| 04/05/93 | Letter to clients re: scheduling | 0:12 |

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| 05/28/93 | Phone call with client re: case and bankruptcy notice that she received. | 0:12 |
| 06/11/93 | Phone call with plaintiff's attorney Sandack re: case and trial. | 0:18 |
| 06/15/93 | Prepared exhibits, exhibit list, and witness list for trial | 2:36 |
| 06/16/93 | Preparation of trial exhibits. Phone call with client and Sandack re: possible settlemtn. | 5:00 |
| 06/17/93 | Review of defendants' exhibits, exhibit list and witness list. Phone call with Sandack re: same. Phone with client re: same. Legal research on notice of lease extension Generes' alleges he delivered and forms of adequate delivery. Conference with DBK re: trial presentation and settlement possibilities. | 1:30 |
| 6/21/93 | Preparation of proposed findings of fact and conclusions of law. legal research same | 3:36 |
| 6/22/93 | Conference with DBK re: proposed findings of fact and conclusions of law and trial presentation. Review and revision of same. Legal research on same. Phone call with Sandack re: fact stipulation. Review of draft fact stipulation. Filed proposed findings of fact and conclusions of law. Review of Generes' deposition in preparation for trial | 5:54 |
| 6/23/93 | Review of Generees' deposition. Phone call Sandack with re: fact stipulation. Review and revision of same. | 2:12 |

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| 6/24/93 | Phone call with defendants' witnesses and Sandack re: case and trial preparation. Review of revised stipulation. | 1:54 |
| 6/25/93 | File fact stipulation | 0:48 |
| 06/29/93 | Preparation for trial. Phone call with potential witnesses. Phone call with clients re: case and proofs. | 10:00 |
| 06/30/93 | Preparation for adversary hearing. Revision of open and closing statements. Preparation of witnesses. Bankrutpcy Court appearance for adversary hearing before Judge Coar. | 8:30 |
| 07/01/93 | Phone call with Judge Coar's clerk re: final order | 0:12 |
| 07/06/93 | Preparation of order. letter to Sandack re: same. Organized file | 0:54 |
| 07/07/93 | Phone call with Sandack re: final order and case. Review and rrevision of final order. Filed same. letter to Coar enclosing same for his review. | 1:30 |
| 07/08/93 | Phone call with client re: case issues | 0:18 |
| 07/22/93 | Phone call with client re: the signing of their depositions and phone call with clerk re: the entry of judgement. | 0:12 |
| 08/04/93 | Review of Generes' motion for new trial. Phone call with client re:same. Phone call with Sndack re: same. legal research on motion for new trial and motion to amend jugment. | 1:42 |
| 08/05/93 | Letter to Generes re: his motio. Legal research re: same | 1:00 |

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| 08/06/93 | Legal research on the cases cited by Generes as basis for new trial and legal research issue of deprivation of closing arguments | 1:36 |
| 08/10/93 | Review of minute order dismissing the Generes' motion for new trial | 0:06 |
| 08/12/93 | Review of Generes motion for a new trial | 0:12 |
| 08/16/93 | Preparation for Court hearing and Bankruptcy Court appearance for hearing on the Generes' motion for a new trial | 2:00 |
| 08/20/93 | Review of Generes' notice of appeal and motion for stay pending appeal. Phone call with client. Legal research same. | 3:00 |
| 08/23/93 | Preparation for court hearing re: stay. Conference with Generes' after court hearing on motion for stay. Phone call with client re: same | 1:06 |
| 08/01/94 | Review of order setting status hearing in Bankruptcy Court | 0:18 |
| 12/19/95 | Phone call to Friedman of U.S. Trustee's office re: Bankruptcy Court status hearing. | 0:12 |
| 01/08/96 | Phone call with Friedman of U.S Trustee's office re: next Bankruptyc Court status hearing and the status of the attorney fee petition in the 7th Circuit | 0:18 |
| 02/07/96 | Review of Generes' Petion for Certiorari to the U.S. Supreme court on the Adversary Hearing issues. Legal reserach on rules applicable to same. Conference with DBK re: same | 1:06 |

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| 02/12/96 | Letter to Ed and Patty re: Generes Certiorari petition | 0:06 |
| 02/20/96 | Phone call with Friedman of the U.S. Trustee's office re: Bankruptcy Court status hearing tomorrow. | 0:18 |
| 02/21/96 | Bankruptcy Court appearance for status hearing on Generes' case | 2:42 |
| 03/07/96 | Review of Generes' petition for rehearing and suggestion of rehearing en banc in the Seventh Circuit. Conference with DBK re: same | 0:42 |
| 03/11/96 | Preparation of Bankruptcy Court petition for fees and related papers | 4:24 |
| 03/12/96 | Preparation of Bankruptcy court petition for fees and related papers. Arranged for filing and service of the papers | 2:12 |
| 03/13/96 | Revised Bankruptcy Court petition for fees and related papers. Arranged for filing and service of same | 5:00 |
| estimate 3/13/96 through 5/15/96 | Including prepartion of reply papers on Bankruptcy Court fee mtion and court appearance for decision on same | 5:00 |
| **Subtotal for Mark E. King** | **101:48 hours at $150 per hour** | **$15,222** |
| 01/11/93 | Preparation of clients for their deposition. conference with Mark King ("MEK") and clients re: same | 0:36 |
| 06/17/93 | Conference with MEK re: trial and settlement. | 1:00 |
| 06/22/93 | Reviewed plaintiff;s and defendants' findings of facts and conference with MEK re: presentation of case | 0:30 |

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|---|---|---|
| 06/28/93 | Conferences and phone calls with client and with MEK re: trial | 0:42 |
| 07/23/93 | Review of Generes' motion for new trial. Phone call to client re: same | 0:36 |
| 02/07/96 | Conference with MEK re: Generes' Petition for Certiorari to the U.S. Supreme Court. | 0:18 |
| 03/07/96 | Conference with MEK re: Generes' petition for rehearing and suggestion of rehearing en banc in the Seventh Circuit. | 0:18 |
| Subtotal for David B. Kahn | 4 hours at $250 per hour | $1,000. |

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| Attorney | |
| Mark King | $15,222 |
| David Kahn | $1,000 |
| Total Fee: | $16,222 |
| **Total Fee and expenses:** | **$17,100.80** |

EXHIBIT A
TO THE
SECOND AFFIDAVIT OP MARK E. KING

THE FIRM RESUME OF

DAVID B. KAHN & ASSOCIATES. LTD.David B. Kahn graduated with honors from Washington University in 1964, ranking first in the School of Economics, and received a J.D. from Harvard Law School in 1967. He is admitted to practice before the Supreme Court of Illinois, the United States Tax Court, the Federal District Court for the Northern District of Illinois, the Federal District Court for the Central District of Illinois, the Seventh

Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the United States Supreme Court.

He has litigated in numerous suits in both the state and federal courts, and has conducted appeals in the Illinois and Federal appellate courts. He was chief counsel to the Sparling Commission of the American Civil Liberties Union which studied the police riots preceding the 1968 Democratic National Convention in Chicago. He is an active member of several bar associations and is a founder of the Chicago Bar Association Committee on Class Litigation. A substantial part of his practice is devoted to participation in major complex litigation. Mark I. King graduated with honors from Northwestern University in 1980 and with high honors from ITT/Chicago-Kent College of Law in 1985, where he was a member of the board of editors of the Law Review, won the ITT/Chicago-Kent College of Law School Moot Court competition, won the 1984 Corpus Juris Secundum Award for significant legal scholarship, and received the 1984 American Jurisprudence Award for scholastic achievement. He was also the winner of the ABA section of Urban, State and Local government law award for scholastic achievement in the area of Land Use Law and the author of "Federal Preemption of the State Regulation of Nuclear Power: State Law Strikes Back Silkwood V. Kerr-McGee Corporation." ITT/ Chicago -Kent Law Review (1984).

. He is admitted to practice before the Supreme Court of Illinois, the Federal District Court for the Northern District of Illinois, the Federal District Court for the Central District of Illinois: the Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals. He has served as counsel in numerous actions in both the state and federal courts and has conducted appeals in the Illinois and Federal appellate courts. A substantial part of his practice is devoted to participation in major complex litigation.

Representative Cases: The attorneys of David B. Kahn & Associates, Ltd. have had considerable experience in complex litigation, including litigation under federal securities and antitrust laws, shareholder derivative statutes, state and federal constitutional provisions and other types of litigation. Examples of cases in which we have served as lead or co-lead counsel include: Haven Pharmacy. et al. v. Abbott Laboratories. et al. (No. 95-C-0663.

N.D.Ill.) (prescription drug antitrust action); In re PS Group Securities Litigation (93-2046, C.D. Ill.) (securities fraud); Kopelman v. The Managers Funds, et al. (394 Cv 01875, D.Conn.) (securities fraud and Investment Company Act violations); Progressive United Corpration v. Belzbera,(BC 051367, Cal.Sup.Ct.) (fraudulent transfer); Prettyman v. Commonwealth Edison (No. 93 CH 8838, Ill.) (class action challenge to employment policies); Mendel v. Carroll et pl. (CA No. 13306, Del.) (derivative and shareholder action against corporate board for breach of fiduciary duty); D'Abla et al. v. Whitley, et al. (91 CH 11858, Ill.) and Grail, et al. v. Bugher (92 Cv 923, Wisc.) (equal protection challenges to the imposition of Illinois and Wisconsin sales tax on automobile rebates); Fry v. UAL Corp. (90 C 0999, N.D.Ill.) (securities fraud); ITSI T.V. Productions, Inc. v. CARF, et al. (CIV-S-89-1686 LKK, E.D.Cal.) and ITSI T.V. Productions, Inc. v. Bally's Grand Inc., et al. (Cv-N-90-314-HDM, D.of Nev.) (copyright infringement actions against numerous defendants in California and Nevada); Rubin v. Sears (76 CH 1366, Ill.) (nationwide class action challenging defendants' administration of employee life health insurance program); Firestone v. Sears (79 CH 8290, Ill.) (nationwide class action challenging defendants' administration of employee health insurance program); and Pollion v. Powell, 47 F.R.D. 331 (N.D.Ill.). We have also acted as co-counsel in many other cases including Wilensky, et al. v. Digital Equipment Corp. et al. (Cv No. 94-10752-JLT, D.Mass) (securities fraud) and In re T$^2$ Medical Inc. Shareholders Litigation (1:94-Cv-744-RLV, N.D.Ga) (securities fraud).

## IV Petition for Rehearing in the Seventh Circuit

### TASKER GENERES' PETITION POR REHEARING AND SUGGESTION FOR REHEARING IN BANC

The plaintiff-appellant, Tasker Generes, pro se, petitions for rehearing from the Court's final order of February 21, 1996 and suggests rehearing in banc. Ms. Dowd, my former attorney, concluded her representation by letter sent on February 26, 1996. After analysis, it is my belief that the panel decision is contrary to decisions of the Supreme Court of the United States and of other circuits, and that consideration by the full court is necessary to secure and maintain uniformity of decisions.

This Court has concluded that Tasker Generes's appeal was frivolous and imposed on him alone $19, 205.18 in sanctions. (Order, February 21, 1996). As shown below, this decision is contrary to the rule announced in McKnight v. General Motors Corp., 114 S. Ct. 1826, 1826 (1994) (rev'g this Court's imposition of Rule 38 sanctions for a frivolous appeal where the question in the appeal had not been decided by the Supreme Court)

This Court has reversed the determination by the Bankruptcy Court that each side should bear their own costs. Bankruptcy Judge Coar determined that his decision was purely based on his credibility finding against Generes. In re Generes, 69 F.3d 821, 824 (1995). In addition, this Court found the Judge Coar abused his discretion by not awarding attorney's fees and costs inasmuch as Generes had perjured himself and made unsubstantiated accusation during the bankruptcy proceedings. This Court also held that Judge Marovich, in the District Court, abused his discretion in this case. He had held, at 1022-23, that Generes' appeal to the District Court was frivolous under the frivolous clause of Fed. R. Civ. P. 11. He expressly refused to award, however, any monetary sanctions on Morrells' application for fees. He restricted himself to criticism in his published opinion. In re Generes, 165 B.R. 1011 (N.D. Ill. 1994). This Court found that an abuse of discretion.

In summary, this Court has created the unjust rule that where the Bankruptcy Court does not believe one's trial testimony, the person giving testimony is a perjurer and person of bad morals, who should be punished. Judge Coar, who observed the parties did not hold that Tasker Generes had committed perjury. On the contrary, the Bankruptcy Court required each party to pay its own costs and did not sua sponte impose any sanctions. See attached Order. Judge Coar made no finding the Tasker Generes acted in bad faith. Also, the Morrells did not make any motion for sanctions to the Bankruptcy Court. The Morrells nevertheless appealed the failure to award costs and attorneys' fee, after Generes appealed.

This Court's rule conflicts with the Fifth Circuit's decision in Rodrigues-Gutierrez v. INS, 59 F.3d 504, 507-508 (5th Cir. 1995): The Fifth Circuit, quoting a decision from the Ninth circuit, held that to assume:

a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character ... is not only legally invalid, but is contrary to the basic sense of fairness upon which our legal system is founded. (citation omitted). The BIA incorrectly concluded that Rodriguez was not a person of good moral character, because it erroneously held that a finding that testimony lacks credibility is the equivalent to a finding that the witnesses has given false testimony.

Thus, the Seventh Circuit rule implements a regime which is contrary to the basic sense of fairness upon which our legal system is founded. You are encouraged to read the Bankruptcy trial transcript, a separately bound exhibit to this Petition. Afterwards, ask yourself do you agree with Judge Coar that each party should bear their own costs. Ask has Judge Coar abused his discretion? Or, has this Court abused its discretion? An abuse of discretion occurs where a ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (rev'd on other grounds by order amending rules, 146 F.R.D. 404 (Apr. 22, 1993)).

Regardless whether the sanction in this case against Tasker Generes is called a criminal fine or a civil sanction, it is subject to constitutional constraints. This Circuit may not impose fines without first establishing guilt by proof beyond a reasonable doubt. Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937, 1945 (1994). The rule in this Circuit contravenes this standard.

The holding of this Court that Tasker Generes is a perjurer is at the root of the sanctions imposed against him under Rule 38. On top is this Court's finding that Tasker Generes brought a frivolous appeal from Bankruptcy Court to this Court. The fact that no monetary sanctions were imposed on Tasker Generes's attorney Lynn Dowd shows that this Court accepts the arguments she made that she did not bring a frivolous appeal and undercuts the Court's finding of frivolousness. See Responses to Rule 38 Notice.

This Court held that the appeal was frivolous because it was an appeal of sanctions and because it reargued facts and credibility issues previously ruled upon. In addition to the fundamental error in the sanction issue, the Court's holding on the frivolity of an appeal based on credibility finding is also erroneous. Although this Court characterized the issue of whether closing argument is permitted as a separate procedural question, it can not be justly disassociated. Whether there has been a fair trial with due process of law is the fundamental question. No standard of review matters or can be applied, when there has not been a fair trial, because standard of review is derivative and subsidiary. It does not even come into operation until there has been a fair trial.

Tasker Generes argues the credibility findings of the Bankruptcy Court are immaterial on appeal because denial of closing argument requires a new trial. Factual findings made without the benefit of closing argument by Tasker Generes's attorney, Ronald Sandack of SMITH WILLIAMS and LODGE, Chartered, who could explain and put the facts in proper perspective to the Court renders the Court's finding outside of the logic granting deference. After all, Fed. R. Bankr. P. 8013, requires that due regard shall be given to

the opportunity of the bankruptcy court to judge the credibility of the witnesses. (emphasis added). When closing argument is denied by the Bankruptcy Court, the due regard to be given is compromised and negative. An appeal then is not frivolous per se.

The United States Supreme C( irt's decision in FCC v. WJR. The Goodwill Station, 337 U.S. 265, 277 (1949) held that the Fifth Amendment due process rights to closing argument in a civil proceeding must be decided on a case-by-case basis. This Court rejects that Supreme Court rule. Instead it has adopted as a matter of federal procedural law, an appellate court decision from the State of Illinois1 that closing-argument is merely a matter of privilege and not a right. In re Generes, 69 F.3d 821, 825 (1995). Moreover, the U.S. Supreme Court has acknowledged that a hearing, in its very essences1 demands that he who is entitled to it shall have the right to support his allegations by argument however brief. The hearing is the hearing of evidence and argument. Without hearing argument, the Supreme Court said in Morgen v. United States, 298 U.S. 468, 480 (1936):

It is manifest that the hearing has not been given. And, the U.S. Supreme Court said in Hovey v. Elliot, 167 U.S. 409 (1987):

Wherever one is assailed in his person or his property, there he may defend for the liability and the right are inseparable. This is a principle of natural justice recognized as such by common intelligence and the conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

Thus, the failure to allows closing argument, which the U.S Supreme Court has held is integral to a hearing, effects the construction of Fed. R. Bankr. 8013. It requires findings of fact without closing argument to be disregarded. Ms. Dowd properly presented the following cases to this Court.

The Kansas Supreme Court has held that counsel has an absolute right to closing argument. Richas v. Wichita Precision Tool Co., 373 P.2d 201, 204-206 (Kan. 1962):

Our system of jurisprudence is founded on the proposition that every litigant has a right to be heard. The right to be heard carries with it the absolute right to be represented by counsel, and the right of counsel to assist the court by oral argument in analyzing the evidence and applying the law.

The New Jersey Supreme Court has also held that the right of a party to present analysis of evidence and inferences claimed to be deducible therefrom to trier of facts, whether that tribunal be judge or jury, is subject only to reasonable limitation of a sound discretion. Aladdin Oil Burner Corp. v. Morton, 187 A. 350,350 (N.J. 1936) holding:

The state of the case exhibits issues of fact: and, in this situation it was error for the judge, at the close of the case, to deny the right of summation asserted by appellant. This constituted an arbitrary deprivation of an absolute right, inherent in our system of trial procedure, rather than the exercise of a discretionary authority, reviewable only in the event of abuse -the right, of the very essence of the right of hearing answering the requirements of due process, to present an analysis of the evidence and the inferences claimed to be deducible therefrom to the trier of facts, be that tribunal the judge or a jury. It is, of course, subject to reasonable limitation in the exercise of a sound discretion. (citations omitted). But limitation necessarily connotes the existence of this primary right. The informality of procedure permissible in district court proceedings does not comprehend the deprivation of an essential right such as this. That tribunal' findings of fact on conflicting evidence are not reviewable on appeal. The judgment is accordingly reversed, and the record remitted for further proceedings not inconsistent with this opinion; cost to abide the event.

Applying this logic to the case at bar, pursuant to Fed. R. Bankr. P. 8013, the due regard to accorded Bankruptcy Court that denied

closing argument is none. The case must be remanded for a new trial. This case, like the above case, exhibits issues of fact that mandate closing argument not be denied.

The Supreme Court of North Dakota has held that parties in non jury civil cases have a right to present final argument. Fuhrman v. Fuhrman, 354 N.W.2d 97, 101 (Dakota 1977). It examined precedent across the United States in its opinion. At 101, the Court quoted from the United States Supreme Court decision in Herring v. New York, 422 U.S. 853, 863 (1975):

But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel. (citation omitted) And, as the same court points out in a footnote, closing argument in a bench trial may be even more important than in a jury trial, since a judge reaches his decision without the stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury. (citation omitted) While the Supreme Court was speaking in the context of a criminal trial to the court, we believe the statements we have quoted are equally applicable to civil cases.

Thus, in the case at bar, it being a bench trial, closing argument, certainly was important. Since, a finding of lack of credibility without closing argument, has resulted on appeal in a perjury fine of $19,205.12. Tasker Generes has been deprived of Sixth Amendment due process even if the proceeding is civil.

Likewise, the U.S. Supreme Court has found the label civil or criminal to be of little consequence when Constitutional rights such as Double Jeopardy, Due Process of Law, and Excessive Fines are concerned. DeDartment of Revenue v. Kurth Ranch. 114 S. Ct. 1937, 1945 (1994). In addition, the Standards for Professional Conduct within the Seventh Federal Judicial Circuit. Court's Duty to Lawyers: Rule 8, requires the court in both civil and criminal cases to allow closing argument.

A conclusion that the appeal was frivolous is unsound. It certainly cannot support Rule 38 sanctions without violating the rule of McKnight v. General Motors Corp., 114 S.Ct. 1826, 1826 (1994) (rev'd sanctions imposed upon an appellant's attorney by this Court for making an argument even though the argument was directly foreclosed by Seventh Circuit authority because it was an issue that the Supreme Court had not yet addressed.)

Also, appellants should not be sanctioned for appeals in which they make good faith arguments for an extension of law on an issue of first impression. See Rogers v. Wood, 910 F.2d 444, 449 (7th Cir. 1990). See also 28 U.S.C. § 1291 (granting litigants the right to appeal adverse judgments); Rules Enabling Act, 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right"). However, a penalty against Tasker Generes, on the basis of a credibility finding, denies Sixth amendment right to effective assistance and closing.

In response to the cross-appeal on sanctions, appellant believed it was appropriate and meritorious to address the legal effect of the Bankruptcy Code's requirement that a request for attorney's fees must be raised and preserved in the bankruptcy court proceeding under Fed. R. Bankr. P. 7008(b).

This Court's held that old Fed R. Civ. P. 11 applies instead of the amended rule effective in December of 1993 to the District Court's decision on April 21, 1994 which denied monetary sanctions. In re Generes, 69 F.3d 821, 827 (1995). But the amended rule was applied in a case commenced before the amendment in Elliott V. Tilton, 64 F.3d 213, 215 (5th Cir. 1995)(rev'g sanctions: a) motion for sanctions, decision, and sanctionable conduct occurred after the effective date of the rule. b) sanctions, under inherent authority, rev'd for failure of trial court to make the required finding of bad faith, at 217). Generes' opening brief, Judge Marovich held frivolous under the first prong of rule 11. It was filed on November 15, 1993, and so could have been withdrawn within the safe harbor period under the new rule after December 1, 1993, had Morrells

made a safe harbor demand. Morrells made no demand to withdraw the appellate brief. Nor did Judge Coar make a finding of bad faith against Tasker Generes. Since Judge Coar made no finding of bad faith no sanction under inherent power is permitted. See also, Knipe v. Skinner, 19 F.3d 725 (2nd. Cir. 1994) (concluding that a just and practicable application requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version because Rule 11 sanctions should be imposed with caution, citing to third circuit cases)

The amendments to Fed. R. Civ. P. 11, by their terms govern: all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending. 146 F.R.D. 404 (Apr. 22, 1993) (Supreme Court order amending the Federal Rules of Civil Procedure. Several circuits have interpreted this language, holding that the amendments should be applied to pending cases to the maximum extent possible. Burt v. Ware, 14 F.3d 256, 259 (5th Cir. 1994). But see Cleveland v. Porca Co., 28 F.3d 289 (7th Cir. 1994). Generally a court is to apply the law in effect at the time it renders its decision. Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974). Indeed, at common law, statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil, were understood to preclude punishment for acts antedating the repeal. See United States v. Chambers, 291 U.S. 217, 223-224 (1934).

This Court also erroneously holds that unless monetary sanctions are awarded, no sanctions have been awarded. In re Generes, 69 F.3d 821, 827 (1995). However, the general rule is published criticism by a court about conduct does constitute sanctions. Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 842 (1st Cir. 1990); Pony Express Courier v. Pony Express Delivery, 872 F.2d 317, 319 (9th Cir. 1989). In re Kelly, 808 F.2d 549 (7th Cir. 1987). Thus, Judge Marovich did not commit abuse, which this Court held he had committed, by declining to grant monetary sanctions to Morrells in addition to his published reproval. This is true regardless of whether the amended or old rule 11 applied.

Moreover, the comments to the new rule do say that no explanation is necessary for a denial of sanctions.

No monetary sanctions were imposed on Tasker Generes' attorney, Lynn D. Dowd. Lynn D. Dowd, explained to this Court in her Rule 38 Response that she did not charge Tasker Generes for this appeal. Ms. Dowd prepared all the briefs, did all the legal research, and assumed the financial responsibility for appeal. This appeal could not have been brought except for her intervention. Attorney Dowd acknowledged, by signing the briefs, her conclusion that the appeal was not frivolous; and, if so, an undertaking to be responsible. This Court has exonerated her.

Tasker Generes was entitled to rely on her legal advice because she is an expert in appellate law. She was Chairman of the Appeals Department at CASSIDAY, SHADE, & GLOOR. When she left that firm for her present firm, she took over this case from them. Ms. Dowd has been a board member of the Appellate Lawyers Association. She has argued many cases before the Seventh Circuit. All in all, she tells me she has done over 200 appeals. A search on Lexis reveals many cases in which she was appellate counsel. Also, she teaches legal writing at a local law school.

In 1996 and 1995, Tasker has provided pro bono legal assistance to Lian Ying Li, an asylum seeker, held in prison by the INS. In 1994, he succeeded in freeing a women unjustly in prison who was fleeing persecution for her opposition to China's coercive family planning practices. The Court entered a small award. Tasker, born in 1942, has not been employed since 1984, aside from legal assistance to persons detained in prison by the INS and one case for Don Williams, a 1986 collection action brought by Ektelon Corp against Williams. Don has paid no fees to Tasker. Also, Tasker gets $200 about four times yearly as a Cook County Mandatory Arbitration panelist. Otherwise, he never received attorney fees. Also, 1829 Happ, which is for sale to reduce in part the debt owed to Citibank, has been vacant since August of 1994. Tasker Generes has never brought an appeal in the Seventh Circuit before this case and there is no reason to expect he ever will in the future. Tasker Generes is

responsible for the care of his dependent mother-in-law who has suffered strokes which leave her unable to feed, dress, walk, or talk for herself. Given the published opinions of this court, it is not reasonable to expect anyone would employ Tasker Generes. On the other hand, Ms. Dowd is employed by LEVIN, MCPARLAND, PHILLIPS, LEYDIG & ~ABERKORN, 180 N. Wacker Drive, Suite 300, Chicago, IL.

The purpose of sanctions is to act as a deterrent to frivolous appeals. Imposition of sanctions on the client only detracts from the purpose. The imposition solely on Tasker Generes is contrary to Rule 38's purpose, when it is in actuality a fine for perjury. Tasker Generes has never before had an appeal to this Seventh Circuit Court. Ms. Dowd has continued to have cases in the Seventh Circuit (recently doing the oral argument. See, Docket 94-1647, 95-1610.) See Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987) (expert attorney had to pay sanctions - not client).

In any case, the request for fees by Morrells is excessive. Frivolous appeals should be disposed by motion. See, Brooks v. Allison Division, 874 F.2d 489(7th Cir. 1989), where the appellee, rather than filing a motion to dismiss the appeal as frivolous, needlessly burdened this court with a full-fledged brief on the merits, thus failing his duty to mitigate the damages caused by the appeal. See also Espinueva v. Garrett, 895 F.2d 1164, 1167 (7th Cir. 1990). Furthermore on February 26, 1996, before Magistrate Judge Bobrick, Mr. Mark King conceded that Morrells had not paid all his bills. where Mr. King has been attorney throughout for the Morrells1 his bill for effort's, including the filing of a short appellees' brief, does not reflect billing judgment to this Court.

Because whether there was a friviolous appeal of sanctions and credibility issues is the organic substance of this Court's decision, under Osterneck v. Ernst & Whinney, 489 U.S. 169, 174 (1989), this Court's Rule 38 notice will be treated as equivalent to a motion which involves reconsideration of matters properly encompassed in a decision on the merits. Thus, this Court's decision, In re Generes, 69 F.2d 821 (1995) was rendered interlocutory ~)y this Court's

Rule 38 notice in the opinion. The Court's modification to not sanction Ms. Dowd also confirms that effect. Accordingly, this Court's mandate which has been prematurely issued, should be recalled.

In conclusion, this is not an appropriate case for sanctions However, if this court still deems the appeal sanctionable, it is unjust to sanction Tasker Generes, in his circumstances, with money penalty, pro bono INS detainee work instead is suggested.

WHEREFORE, the plaintiff-appellant, Tasker Generes, tenders the foregoing petition for rehearing and respectfully requests that the court impose no sanctions against him, and recall its mandate which was prematurely issued.

Respectfully submitted,

Tasker Generes

AFFIDAVIT OF TASKER GENERES IN SUPPORT OF PETITION FOR REHEARING

Tasker Generes, under oath deposes and states:

1. that, on information and belief, the facts stated above about Ms. Lynn Dowd, are true and correct, and verily he believes them to be true.
2.that the facts about his financial circumstances stated above are true and correct.
3. that the facts about his representation of INS detainees are true and correct.
4. that Mark King before Judge Bobrick on February 26. 1996 conceded Morrells have not paid all his bills for the litigation between Tasker Generes and Morrells.
5. that according to Lotus Word Pro, the document text word count including this affidavit is 3890.
6. Nothing further saith affiant.

_____
Tasker Genenes.

Tasker Generes
I 845 Happ Road
Northbrook, IL 60062-5643

Dated: March 6, 1996